

United States
Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL CARBON COMPANY, a Corporation,
Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion, Claimant of the Steamship "EUREKA,"
Her Engines, Boilers, Tackle, Apparel, Furni-
ture, etc.,

Appellee.

LIBELANT'S EXHIBIT No. 1---DEPOSITIONS
ON BEHALF OF LIBELANT, ETC.

Upon Appeal from the United States District Court for the
Western District of Washington, Southern Division.

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INDEX TO LIBELANT'S EXHIBIT NO. 1.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Certificate of Clerk of United States District Court to Original Depositions and Exhibits	222
DEPOSITIONS ON BEHALF OF LIBELANT:	
COXON, FRANCIS G.	93
KURZ, CHARLES	134
Cross-examination	141
Redirect Examination	151
MITCHELL, ANSON J.	5
Recalled	170
Cross-examination	180
Redirect Examination	200
RICHEY, WILLIAM A.....	106
Cross-examination	119
Redirect Examination	132
Recalled—Cross-examination	208
Redirect Examination	216
WILSON, EDWIN J.....	97
Cross-examination	106
Recalled—Redirect Examination	207
Notice to Take Deposition of Anson J. Mitchell	1
Notice to Take Depositions of R. H. Bagott, H. M. Williams and Charles Kurz.....	3

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. —

NATIONAL CARBON COMPANY, a Corporation,
Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers,
Tackle, Apparel, Furniture, etc.,
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,
Claimant.

Notice to Take Deposition of Anson J. Mitchell.

To the Alaska Steamship Company, Claimant, and
to Messrs. Platt & Platt and to W. B. Stratton,
Attorneys of the Alaska Steamship Company:

You will please take notice that Anson J. Mitchell,
a witness on behalf of the libellant herein, whose
testimony is necessary in this cause, and who is out
of the District in which this cause is to be tried, and
to a greater distance than one hundred miles from
the place of trial, will be examined *de bene esse* on
the part of the libellant in this cause, before C.
May Hudson, a notary public, at the office of Messrs.
Harrington, Bigham & Englar, No. 64 Wall Street,
New York City, New York County, State of New
York, on the 14th day of December, 1916, at the
hour of 10 o'clock in the forenoon, at which time and
place you are hereby notified to be present and put
in interrogatories, if you shall have any.

National Carbon Company

Dated, Seattle, King County, State of Washington, this 2d day of December, 1916.

HARRINGTON, BIGHAM & ENGLAR and
REVELLE & REVELLE,

Attorneys for Libellant.

[Endorsed]: Copy. No. — In the District Court of the United States, for the Western District of Washington, Northern Division. National Carbon Company, Libellant, vs. Steamship "Eureka," etc., Respondent, Alaska Steamship Company, Claimant. Notice to Take Deposition of Anson J. Mitchell.

Service of papers in this case may be made upon Revelle & Revelle, Attorneys for Libellant, at Room 605, New York Block, Seattle, Washington.

Service of the within notice by delivery of a copy to the undersigned is hereby acknowledged this 2d day of December, 1916.

FARRELL, KANE & STRATTON,
PLATT & PLATT,

Attorneys for Claimant, Alaska Steamship Company.

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

IN ADMIRALTY—No. —

NATIONAL CARBON COMPANY, a Corporation,
Libellant,

vs.

Steamship "EUREKA," Her Engines, Boilers,
Tackle, Apparel, Furniture, etc.,
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,
Claimant.

**Notice to Take Depositions of R. H. Bagott, H. M.
Williams and Charles Kurz.**

To National Carbon Company, a Corporation, Libel-
lant, and to Messrs. Harrington, Bigham &
Englar and Messrs. Revelle & Revelle, Proctors
for Libellant.

You will please take notice that the depositions
of R. H. Bagott, H. M. Williams and Charles Kurz,
whose testimony is necessary in this case, and each
of whom is out of the district in which this case is
to be tried, and each of whom is at a distance of
more than one hundred miles from the place of trial,
will be taken *de bene esse* on behalf of Alaska Steam-
ship Company, a corporation, claimant, before C.
May Hudson, a notary public, at the office of Messrs.
Harrington, Bigham & Engler, No. 64 Wall Street,

National Carbon Company

New York City, State of New York, on the 18th day of December, 1916, at the hour of 10:00 o'clock in the forenoon, at which time and place you are hereby notified to be present and put in interrogatories, if you shall have any.

Dated at Portland, Multnomah County, State of Oregon, this 6th day of December, 1916.

PLATT & PLATT,

Proctors for Alaska Steamship Company, Claimant.

[Endorsed]: In the District Court of the United States, for the Western District of Washington, Southern Division. National Carbon Company, Libellant, vs. Steamship "Eureka," etc., Respondent. Alaska Steamship Company, Claimant. Notice to Take Depositions.

[1*] *United States District Court, Western District of Washington.*

NATIONAL CARBON COMPANY,

Libellant,

against

Steamship "EUREKA," Her Engines, etc.

Depositions.

Depositions taken in behalf of the libellant on the 14th day of December, 1916, at 10 A. M., at the office of Messrs. Harrington, Bigham & Englar, 64 Wall Street, New York City, pursuant to notice.

*Page-number appearing at top of page of original certified Libellant's Exhibit No. 1.

APPEARANCES:

Messrs. HARRINGTON, BIGHAM & ENGLAR
(FRANK C. WELLES, Esq.), Proctors for
Libelant.

Messrs. PLATT & PLATT (ROBERT TREAT
PLATT, Esq.), of Portland, Oregon, Proctors
for the Claimant of the S. S. "Eureka" and the
Alaska Steamship Company.

It is stipulated that the testimony may be taken
by a stenographer, fees to be taxable as costs, sign-
ing waived.

Deposition of Anson J. Mitchell, for Libelant.

[2] ANSON J. MITCHELL, called as a witness
on behalf of the libelant, having been duly sworn,
testified as follows:

(By Mr. WELLES.)

Q. Mr. Mitchell, are you connected with the Na-
tional Carbon Company, the libelant in this action?

A. I am.

Q. In what capacity?

A. Traffic manager in charge of all shipping and
receiving of freight.

Q. Are you also familiar with the manufacturing
methods of the company?

A. Fairly familiar; yes.

Q. And with the other business of the company?

A. Yes.

Q. What has been your experience with dry bat-
teries and their manufacture?

A. We have been in the dry battery business—I

(Deposition of Anson J. Mitchell.)

have been with them since we started in the dry battery business 12 to 13 years ago.

Q. During that time have you been connected with the construction and testing of such batteries?

A. Indirectly, yes, the shipping of all batteries comes in under my jurisdiction. I have a superintendent of shipping, who reports to me, and he has men under him who have charge of the testing of all dry batteries.

Q. I mean just personally, as regards testing, etc., of batteries?

A. I know how to test, and did make tests right along for my own information in order to keep in close touch with the business.

Q. I show you a paper headed Oregon-California shipping [3] Co., Inc., and ask you if you know what that is?

A. That is the bill of lading issued by the agent of the Oregon-California Shipping Co., Inc., at New York, covering the shipment of 116 barrels of battery cells, part of the shipment involved in this action.

Q. Is that a bill of lading of part of the goods involved in this case?

A. It is a bill of lading covering one carload of 116 barrels.

The bill of lading is offered in evidence. It is marked Libelant's Exhibit 1.

Q. I show you another paper headed National Carbon Company, and ask you if you know what that is?

(Deposition of Anson J. Mitchell.)

A. That is an invoice showing the value of the cells in the car covered by the bill of lading just mentioned.

Q. Value where?

A. Value at Jersey City or New York City.

Q. Was there any difference in this and the value at Cleveland?

A. Practically none, we make the values the same at Jersey City and at Cleveland.

Q. Was the value the same at the California points of destination?

A. We add the freight rate to that, which would be about three cents a cell. If those had to be delivered at San Francisco, instead of being sold at 21½ cents they would be sold at 24 or 25 cents.

Q. Were the goods set forth in that invoice shipped?

[4] A. Yes, we have reason to believe that they were, the bill of lading from the railroad company shows it and the bill of lading from the steamship company shows it.

Q. Are those the contents of the 116 barrels mentioned in the bill of lading? A. They are.

Q. Are you familiar with the price or value of such cells in the market at the time of this statement, August 31, 1915? A. I am.

The invoice is offered in evidence. It is marked Libellant's Exhibit 2.

Mr. PLATT.—As I understand counsel, the statement now offered in evidence is offered merely to abbreviate the witness' testimony, and not on the

(Deposition of Anson J. Mitchell.)

theory that this paper itself was brought to the attention of the Oregon-California Shipping Co., Inc., or its agents, or anyone representing the ship or the claimant.

Q. Did this paper, exhibit 2, or a copy of it, ever reach the Oregon-California Shipping Co., Inc., or its agents?

A. A copy was attached to my claim papers when rendering same under date of September 6.

Mr. PLATT.—With the understanding that this document now offered in evidence will be connected up with the claim we have no objection to it.

Q. Have you compared this statement with the copy offered in connection with your claim?

[5] A. Yes, compared it at the time the claim was entered.

Q. I show you another paper, headed Oregon-California Shipping Co., Inc., and ask you if you know what that is?

A. A bill of lading covering 12 boxes and 123 barrels of battery cells, part of the original shipment delivered for transporting at Philadelphia.

Q. Whose bill of lading was it?

A. Oregon-California Shipping Co.'s bill of lading.

Q. Is that a bill of lading of part of the goods involved in this action? A. It is.

Q. Were these goods actually shipped?

A. They were.

Q. And delivered to the SS. "Eureka"?

A. They were.

(Deposition of Anson J. Mitchell.)

Q. Were the goods in the preceding bill of lading delivered to the S. S. "Eureka"? A. They were.

The bill of lading referred to is offered in evidence. It is marked Libelant's Exhibit 5.

Q. I show you three papers, headed National Carbon Company, dated September 4, 1915, and ask you if you know what those are?

A. Invoices covering the contents and value of cells included in the bill of lading aforementioned.

Q. Were the goods mentioned in those invoices contained in this shipment? A. They were.

Q. Are they a complete statement of all the goods contained in this shipment?

A. Covered by this one bill of lading, yes.

Q. Are the prices or values set forth in those three [6] papers the true market value of the goods referred to in this bill of lading? A. They are.

Q. The market value at what point?

A. New York City or Jersey City.

Q. Was the value at Cleveland any different?

A. Practically the same.

Q. Was the value at the point of destination any different?

A. It would be plus the freight charges, figured at \$1.25 per hundred weight. We figure three cents a cell, which is based on a barrel containing 125 dry batteries, and each barrel weighing approximately 300 pounds.

Q. Do the figures given in the quantity column of this invoice previously offered in evidence show the number of cells in the shipment? A. They do.

(Deposition of Anson J. Mitchell.)

Q. And your freight is based upon three cents for each of those cells? A. Yes.

Q. Was a copy of these papers ever given to the Oregon-California Shipping Co., Inc.?

A. They were attached to the original claim papers filed on September 6, 1916.

Q. A true copy? A. A true copy.

The papers referred to, consisting of three invoices, are offered in evidence. They are marked Libellant's Exhibit "4A," "4B" and "4C."

[7] Mr. PLATT.—No objection is interposed to the invoices as such, provided they are hereafter connected up with the claim, but subject to the objection that we will hereafter interpose when the claim itself is offered in evidence.

Q. Mr. Mitchell, the invoices that have been put in contain a correct statement of all the goods in these two bills of lading, don't they and their sound market value? A. Yes.

Q. I show you another paper headed Oregon-California Shipping Co., Inc., and ask you if you know what that is?

A. It covers a shipment originally consisting of 124 barrels of batteries and one box, issued by the Oregon-California Shipping Co., Inc., on which a notation is made of 15 barrels short-shipped, to follow on next steamer. In explanation of this short shipment, I would state that Mr. Bates and Mr. Davis of the Shipping Company advised me that they were unable to locate the 15 barrels at the time of loading the original shipment, and afterwards

(Deposition of Anson J. Mitchell.)

due credit was issued for same.

Q. Is this a bill of lading of part of the goods involved in this action? A. It is.

Q. Were the 15 barrels short-shipped ever delivered to the "Eureka"?

A. No, they were delivered to their agents at Philadelphia, but when they had no other boat, we took [8] them off their hands.

Q. Were these three bills of lading delivered to you by the Oregon-California Shipping Co., Inc., or their agents? A. They were.

Q. Was the freight prepaid on all these goods on the "Eureka"?

A. It was.

Q. Were all of these goods shipped from your Cleveland plant? A. Yes, sir.

Q. Were all of the goods delivered to the Oregon-California Shipping Co., Inc., or their agents, at the places and dates stated in these bills of lading?

A. With the exception of the 15 barrels, yes.

The paper referred to is offered in evidence. No objection. It is marked Libellant's Exhibit 5.

Q. I show you another paper headed National Carbon Company, and ask you if you know what that is?

A. Invoice, showing the number of cells and value of cells contained, as covered by the bill of lading just mentioned.

Q. Are the figures set forth in the quantity column the number of cells contained in the shipment?

A. They are.

Q. And are the values set forth the sound market

(Deposition of Anson J. Mitchell.)

values of these goods at New York? A. Yes, sir.

Q. And at Jersey City? A. Yes, sir.

[9] Q. How do they differ from the sound market values at Cleveland and point of destination?

A. Practically the same as at Cleveland but at point of destination we add three cents per cell to cover freight charges.

Q. This is a correct statement of all the goods in this third bill of lading? A. It is.

Q. Was a copy of this invoice delivered to the Oregon-California Shipping Co., Inc.?

A. It was.

Q. State when?

A. With the claim as filed by us on September 6, 1916.

The paper referred to is offered in evidence.

Mr. PLATT.—I have no objection to the offer of the document as an abbreviation of the witness's testimony as to what was shipped, but subject to my objection which will be hereinafter interposed to the claim, when offered, in so far as it is a portion of the claim, or as to its adequacy.

Exception by Mr. Welles.

It is marked Libellant's Exhibit 6.

Q. Did you ever call to the attention of the Oregon-California Shipping Co., Inc., or agents, the quantity, nature and sound market value set forth in these invoices that have been offered in evidence, aside from the claim that you filed with them?

A. Oh, yes; in my visits to [10] New York and Philadelphia on October 9, 1915, I told Mr. Kurtz,

(Deposition of Anson J. Mitchell.)

Mr. Davis and Mr. Bates—in New York I told Mr.— I think his name is English—the nature and character of the goods and their approximate value, which we had on the steamship “Eureka.”

Q. Was the freight prepaid to destination on all of these goods? A. It was prepaid to destination.

Q. Have you ever notified the Oregon-California Shipping Co., Inc., of the nature and value of these goods aside from the claim?

A. Yes, at the time of sending them the bills of lading covering the shipments from Cleveland to New York and Philadelphia, I wrote them a letter enclosing the original bill of lading, giving the number of the barrels and boxes, car number, stating to whom they were consigned and the value, advising them that we had prepaid all charges to destination and asked them to send us the ocean bills of lading.

Mr. WELLES.—I call for the original of that letter and of all other letters between the National Carbon Company, and its representatives and the steamship “Eureka,” her owners, agents and charterers.

Mr. PLATT.—We have not the letters that counsel calls for.

[11] Q. Have you a copy of that letter?

A. I have copies of them.

Q. Carbon copies of the original letters?

A. Yes.

Q. Is that a duplicate original (showing witness a paper)?

A. This is a duplicate of the original letter I had.

(Deposition of Anson J. Mitchell.)

(By Mr. PLATT.)

Q. Made with one impression of the typewriter keys? A. Yes, sir; at the same time.

(By Mr. WELLES.)

Q. Do these three letters which you have referred to refer to the shipment of goods made on the S. S. "Eureka"? A. They do.

Q. Mentioned in the bills of lading and invoices previously put in? A. They do; yes.

Q. Were these letters actually sent to the persons at the addresses designated? A. Oh, yes.

Mr. WELLES.—I offer these three letters of September 1 and September 7, 1915, in evidence.

Mr. PLATT.—Objected to by the claimant on the ground that the values named in the letters of September 7th do not correspond with the values named in Libellant's Exhibit 4 A, B) and C, and Libellant's Exhibit 6.

Exception.

The letters are marked Libellant's Exhibits [12] 7, 8 and 9.

Q. I ask you, Mr. Mitchell, if the car numbers mentioned in these three letters are the correct car numbers of the cars in which the shipment placed on board the S. S. "Eureka" left your plant?

A. Cleveland plant, yes.

Q. How do you explain the apparent discrepancy in the prices given in these three letters and the prices stated in the invoices already in evidence?

A. This is accounted for by the prices in the letters showing that the value was taken on destination

(Deposition of Anson J. Mitchell.)

price instead of New York or Jersey City price, the difference in the two letters consisting of insurance and charges.

Q. Upon what dates did these goods leave your Cleveland factory?

A. On August 31, 1915, we delivered to the New York Central, Cleveland, 116 barrels of these batteries consigned to the National Carbon Company, San Francisco, Cal. September 4, 1915, we delivered to the New York Central at Cleveland, 123 barrels and 12 boxes of these batteries. On September 4, 1915, we delivered to the New York Central at Cleveland, 1 box and 124 barrels of these batteries.

Q. Were these goods in good order and condition when they left your factory at Cleveland?

A. They were.

Q. Were they properly packed?

A. They were.

Q. Did these goods all originate from your Cleveland [13] factory? A. They did.

Q. And were made there? A. They were.

Q. A Mr. Murray is mentioned as the consignee of one lot; that is a consignment of one lot in the bills of lading in evidence; did this Mr. Murray ever own any of these cells? A. No, sir.

Q. Why were they consigned to him?

A. He is our agent, general agent on the Pacific Coast.

Q. Did the title to any of these goods ever leave the National Carbon Company? A. No, sir.

Q. The National Carbon Company, then, were the

(Deposition of Anson J. Mitchell.)

owners of these shipments at all the times mentioned in the pleadings? A. They were.

Q. Was the freight prepaid clear through to the California destination? A. It was.

Q. At the full rate?

A. At the full rate that they asked for, yes.

Q. Did you hear of any difficulty with the Panama Canal at or about this time?

A. From the papers we noticed that there had been a slide in the Panama Canal.

Q. When was this?

A. Well, I think it was about the latter part of September or the first part of October, I don't remember just what date the slide occurred.

Q. Did you communicate with the agents of the steamship with respect to this?

A. On October 1st we wired [14] L. Rubelli's Sons, Philadelphia, asking them to advise the whereabouts of the two steamers which they were agents of, and on both steamers we had various consignments.

Q. Where did you wire from?

A. Cleveland, Ohio.

Mr. WELLES.—I call for the original of this telegram and all other telegrams and messages received by the vessel, her owners, agents and charterers from the libelant or its representatives.

Mr. PLATT.—The claimant states at this time that none of these alleged communications are in its control, or, as far as it knows, in the control of the parties to whom they are addressed; whether or not

(Deposition of Anson J. Mitchell.)

upon the taking of the testimony in Philadelphia of the witness Charles Kurz on behalf of the claimant, the originals can be procured, the claimant cannot at this time state. We have copies of certain letters and telegrams which Rubelli's Sons have furnished us.

Q. Have you a copy of that telegram?

A. I have. I have the copy of the original telegram.

Q. The duplicate original carbon copy?

A. It is.

Q. I show you this carbon copy of a night letter dated Cleveland, October 1, 1915, and ask if that was sent to L. Rubelli's Sons, Philadelphia?

A. It was.

The copy is offered in evidence.

[15] It is marked Libellant's Exhibit 10.

Q. What if any reply did you receive to that?

A. Under date of the 2d Rubelli's Sons replied as per telegram.

Q. I show you another telegram dated Philadelphia, October 2, and ask you if that is a correct copy of the reply received from Rubelli's Sons?

A. It is.

The copy is offered in evidence. It is marked Libellant's Exhibit 11, with the exception of the pencil notations.

Q. Are those pencil notations your own private memoranda? A. They are.

Q. On receipt of this telegram of October 2d what did you do, Mr. Mitchell?

(Deposition of Anson J. Mitchell.)

A. We did nothing until October 8th, then I came to New York and interviewed Phelps Brothers & Company.

Q. Who are Phelps Brothers & Company?

A. New York agents of Rubelli's Sons, act as agents for the Oregon-California Shipping Company.

Q. Are they the agents of this vessel?

A. Yes. After leaving New York I went to Philadelphia and interviewed Mr. Kurz, Mr. Davis and Mr. Bates.

Q. Who was Mr. Bates?

A. Mr. Bates, as I understand, is agent representing the Oregon-California Shipping Company at Philadelphia.

[16] Q. How do you understand he is agent?

A. By signatures to the bills of lading, and also by his saying so.

Q. Who is Mr. Davis?

A. Mr. Davis, I understand, is general freight agent and represents Mr. Kurz of Rubelli's Sons, who are acting as agents for the Oregon-California Shipping Company at Philadelphia.

Q. Are these gentlemen all agents of the S. S. "Eureka" and her charterers, the Oregon-California Shipping Co.? A. That was my understanding.

Q. How did you get that understanding?

A. From conversations with these gentlemen and also from signatures to the bill of lading offered in evidence.

Q. Did they all tell you that they were agents of

(Deposition of Anson J. Mitchell.)

the company? A. Yes.

Q. More than once? A. At various times.

Q. Were they engaged in the business of the ship and its cargo? A. Yes.

Q. They conducted negotiations with you in respect to that? A. They did.

Q. Did they have negotiations with you with respect to the forwarding of this cargo?

A. They did.

Q. After there was delay in transmission?

A. Yes, sir.

Q. Now, on or about October 9th, when you saw these gentlemen in Philadelphia, what took place?

A. I explained to them the detail and character of the goods, and at [17] that time we went into the question as to whether or not it would be advisable, or whether we could take the goods out of the ship. They called their foreman upstairs, and he brought up the loading sheet,—I presume they call it that, I don't know the technical name—but the loading sheet showing where the goods which had been received at Philadelphia had been loaded, in what part of the boat, and I asked for the approximate expense to unload these barrels. I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get

(Deposition of Anson J. Mitchell.)

them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time.

Q. You made a demand for the delivery of the goods at Colon at that time? A. I did.

Q. What did you explain to them was the nature of these goods?

A. I told them that the nature of a dry battery is that after we ship a battery we are supposed to [18] impress upon our people and all dealers that after 90 days or approximately thereto the life of a cell deteriorates or the cell itself deteriorates, and that we would guarantee our batteries to be as good 90 days from the date of shipment as the date of shipment, and we would stand back of and replace any batteries which went bad in that time. Also told them that heat would affect the batteries to such an extent that they would deteriorate very much faster than if kept in a cool place.

Mr. PLATT.—Counsel for claimant moves to strike out all that portion of the answer of the witness which relates to the deterioration of the subject of libellant's shipment on the ground that no liability is shown by the carrier or the vessel, and the same is expressly excepted under Paragraph 3 of the provisions of the bill of lading, printed upon the back thereof, and constituting a contract between the carrier and the libellant, and also under Paragraph 1

(Deposition of Anson J. Mitchell.)

of the provisions of the contract contained within the bill of lading, and also as to any deterioration arising from heat or prolongation of the voyage, or bad weather, accidents of navigation, and depreciation or deterioration due to the inherent character of the commodity under carriage, and under the further and additional provisions [19] of the bill of lading constituting a contract between the libelant and the carrier and the vessel, all testimony with relation to deterioration of the commodity or subject of the shipment by reason of the matters and things covered by which the answers to the last interrogatories are each and all of them incompetent, irrelevant and immaterial.

Mr. WELLES.—Counsel for libelant asks that counsel for the claimant specify under exactly what exceptions and words of the bill of lading the foregoing answer of Mr. Mitchell is objected to.

Mr. PLATT.—Claimant claims that the answer to the last question is incompetent, irrelevant and immaterial under Clause 3 of the bill of lading, providing that no carrier shall be liable for any loss or damage arising from any of the following causes: acts of God, if it shall be hereafter determined by the Court that the slide in the Panama Canal was due to an act of God; no carrier shall be liable for any loss or damage arising from any accident on or perils of the seas or other waters, or of steam or inland navigation. No carrier shall be liable for any loss or damage arising from detention or accidental delay. No carrier shall be liable for any loss or dam-

(Deposition of Anson J. Mitchell.)

age [20] due to dampness, loss in weight, sweat, evaporation, heat, natural decay or exposure to the weather.

Under paragraph 1 of the bill of lading it is provided "it is mutually agreed that the carrier shall not be liable for loss or damage caused by causes beyond its control or accidents of navigation, of whatsoever kind."

The carrier shall not be liable for loss or damage or to change of character of shipment or for any loss or damage arising from the nature of the goods, nor for any loss or damage caused by the prolongation of the voyage, and in the 8th paragraph of the bill of lading "when the delivery is prevented in consequence of weather * * * strikes, troubles * * * and all analogous circumstances whatsoever * * * the carrier is exempted from loss or damage," all of which provisions constitute a contract between the libellant and the carrier and the steamship, the benefit of all of which the claimant at this time claims as in its answer set forth.

Mr. WELLES.—Libellant asks that all of the objections of the claimant above stated to the answer to the last question be overruled and stricken out as it is not shown that the damage [21] was due to any of the causes stated by claimant in his objections, and that the said objections are too indefinite and uncertain, and constitute in part conclusions not warranted by the evidence.

Q. Were these goods delivered to you, in response to your request made to these agents at Philadelphia,

(Deposition of Anson J. Mitchell.)

at Colon? A. No, they were not.

Q. Did they refuse to deliver them?

A. They did.

Q. Why did you want the goods at Colon at that time?

A. In order to save any damage that might happen to the goods and because we needed the goods badly in order to ship our customers' orders.

Q. Did you expect to use them at Colon?

A. Either to transship them to San Francisco or back to New York or Jersey City.

Q. Did the "Eureka" or her agents offer to transship them or to send them forward?

A. They did not.

Q. Did they offer to deliver them back to the point of shipment?

Mr. PLATT.—I object to this question as immaterial, on the ground that that is not the contract under which the carrier is operating.

Mr. WELLES.—Exception to objection is reserved.

A. They did not.

[22] Q. What, if anything, did they offer to do with the goods? A. At that time?

Q. Yes.

A. I could not get any information from them at all, except that the Rubelli people told me that they were doing everything in their power to get the executors of the Oregon-California Shipping Co.—the managers—to transship the goods or to do something with them in order to satisfy the demands made

(Deposition of Anson J. Mitchell.)

on them by the various consignors.

Q. Did they state that they had been advised of the "Eureka's" arrival at Colon?

A. I can't remember.

Q. Did they tell you whether they knew she was there or not?

A. Yes, they told me she was there, and they even told me that they had cabled contrary instructions themselves—cabled instructions to the captain contrary to the instructions issued by the Oregon-California Shipping Company.

Mr. WELLES.—Libelant calls for the original or correct copies of the cables mentioned. Libelant also calls for a copy of the stowage plan mentioned by Mr. Mitchell.

Mr. PLATT.—None of those documents are in the possession or under the control of the claimant; whether they can be procured in connection with the testimony of the witness Charles Kurz, which is to be taken at a later date, of course I cannot at this [23] time state.

Mr. WELLES.—Libelant calls attention to the fact that the stowage plan and the other documents previously referred to, are shown to be within the possession of the agents for the vessel.

Mr. PLATT.—Claimant states that as the present owner of the vessel, and defending this suit, none of these documents are under its control. It has no connection with the Oregon-California Shipping Company or any of its agents, and up to date has not been able to procure any of the documents referred

(Deposition of Anson J. Mitchell.)

to, if they are in existence or if they are not in existence.

Q. Did you offer at this time to go down to Panama and take delivery of the goods there? A. I did.

Q. Was that offer accepted? A. It was not.

Q. Were the goods delivered at Colon or any near-by point? A. No, sir.

Q. Where were they delivered?

A. New Orleans.

Q. Were there other vessels carrying goods from Colon to United States ports at about this time?

A. There were.

Q. If those goods had been unloaded at Colon could they have been brought to the United States by other routes?

Mr. PLATT.—Objected to on the ground that the witness has not shown that he knows anything about [24] that.

A. They could have been.

Q. As traffic manager of the National Carbon Company you are familiar with the methods of shipping goods from Colon to the States by various routes?

A. Very conversant with them.

Q. Were you at this time? A. Yes, sir.

Q. Was this information communicated to the main office of the Oregon-California Shipping Company by Rubelli's Sons, the fact that you had taken up this question of delivery at Colon? A. Yes, sir.

Q. How was it communicated?

A. By telegrams.

Q. I show you a copy of a telegram dated October

(Deposition of Anson J. Mitchell.)

18, 1915, from Rubelli's Sons to the Oregon-California Shipping Company, Portland, Oregon, and ask you if that is one of the telegrams?

A. That was given me by the agents of the Oregon-California Shipping Company in Philadelphia as being a true copy of the telegram they had sent to the Oregon-California Shipping Company, at Portland, Oregon, in reference to our shipment.

The telegram is offered in evidence.

Mr. PLATT.—No objection to the form, but objected to as incompetent to bind the vessel on the ground that the terms of carriage are defined by the bill of lading, and that the consignor of a [25] portion of the shipment had no legal right to require the ship to discharge the cargo or a portion of it at the point designated by him, but that the carrier's obligations, as well as its rights as to the disposition of the goods under the circumstances as developed at the Panama Canal, are defined by the bill of lading, and that the ship performed its legal obligations under that bill of lading; and on the further ground that the instrument offered in evidence is immaterial because it has been heretofore testified by the witness that the libelant accepted delivery of the goods at the port of New Orleans, and any negotiations or exchange of letters or telegrams or oral representations of the negotiations as to discharge at some other point are incompetent, irrelevant and immaterial at this time.

Mr. WELLES.—Libelant moves to strike out this objection as incompetent, irrelevant and immaterial,

(Deposition of Anson J. Mitchell.)

and consisting of conclusions not based upon facts in evidence.

Q. The agents of the steamship company admitted to you that they had sent this telegram to the Oregon-California Shipping Company, did they not?

A. They did, and gave me that copy, which was made in their office.

Q. With respect to your particular cargo?

A. Yes.

[26] The copy of telegram is marked Libelant's Exhibit 12.

Q. Do you know whether Rubelli's Sons sent any other message to the Oregon-California Shipping Company in reference to this, about this time?

A. I do; they gave me a copy of another telegram which they had sent, which is here now.

Q. I show you a copy of a telegram and ask you if this is the copy of the other telegram which they gave you? A. It is.

Q. Did they state that as agents of the S. S. "Eureka" they had sent this message to the Oregon-California Shipping Company? A. They did.

The copy is offered in evidence.

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial for the reasons stated as objections to Libelant's Exhibit 12, and for the further reason that the same does not purport to be an original telegram produced from the custody of either the sender or the receiver, and no showing has been made as to why the original is not produced, and on the further ground that the same is not properly and

(Deposition of Anson J. Mitchell.)

legally identified as having been sent, but is only a hearsay statement to the witness as to what was told him, [27] and there is no showing that the same was ever received by the party named as the receiver of the message, and the vessel, under the circumstances, cannot be bound.

Exception.

The copy is marked Libelant's Exhibit 13.

Mr. WELLES.—Libelant submits that the telegram is competent as an admission by the agents of the vessel. Libelant offers to connect up all copies of correspondence and other documents offered in evidence, if not already pertinent.

Libelant calls for the offer of the 14th referred to in the last mentioned telegram dated October 19, 1915.

Q. Have you, in your possession or control, the originals of these last two telegrams offered in evidence? A. No, I have not.

Q. Do you know where they are?

A. Presumably with L. Rubelli's Sons in Philadelphia, because these copies were handed to me by the agent of L. Rubelli's Sons at Philadelphia.

Mr. WELLES.—I call for the originals of those telegrams.

Mr. PLATT.—Neither the originals nor copies [28] of the telegrams purported to be covered by Libelant's Exhibits 12 and 13 are in the custody or control of the claimant. I move to strike out the answer of the witness on the same grounds as hereto-

(Deposition of Anson J. Mitchell.)

fore interposed to Libelant's Exhibit 13.

Exception.

Q. Did you take up this question of delivery or landing goods further with the agents of the vessel?

A. At this one conversation or later?

Q. Later? A. Yes.

Q. Give me the date.

A. On October 14th by long distance telephone.

Q. When after that?

A. On October 16th called them on long distance telephone; Mr. Davis advised me at that time of the arrangement which they were anticipating putting through in order to have the goods unloaded at Panama.

Q. What arrangement?

A. That is covered by their circular, afterwards issued under date of October 22.

Q. Was anything said by them at any of these conferences about being able to get the vessel through the Panama Canal or that they hoped to be able to get her through the canal?

A. I don't remember them saying anything about that.

Q. Do you recall that they ever mentioned to you any hopes of being able to get the vessel through the canal and on to destination?

A. Yes, I remember that they did tell me that they had received a cablegram from the [29] captain, the captain of this boat, stating it as his opinion, or someone else's opinion there, that it would be a long time before the slide—or the canal would be open;

(Deposition of Anson J. Mitchell.)

they also told me that they had got in touch with Colonel Goethals and he or his office—no, no, that was not it,— these Rubelli people—it was not Colonel Goethals, some person in charge of the canal, and was informed by them that it would be a long time before the boats could get through.

Mr. WELLES.—We call for all the cables, messages or telegrams referred to by the witness with respect to the condition of the canal and the chances of getting through received from the captain or the canal authorities by the agents of the vessel, and their replies.

Mr. PLATT.—The originals of any documents or messages between the captain of the vessel and the Oregon-California Shipping Co., Inc., if any, of which counsel cannot positively speak, except from memory at this time, are in evidence in the case now pending in the District Court of the United States for the Southern District of Louisiana wherein the Crossett Western Lumber Company is libelant and the Oregon-California Shipping Co., Inc., and others are defendants, so that as to those originals, if any, counsel cannot without a demand for [30] much longer time than has been made, respond. The captain of the vessel also will be a witness for the claimant on the 18th instant, when opportunity will be had to interrogate him as to what, if any, messages he sent on this subject.

Q. Did you afterwards receive any statement of what the plan was to have the goods unloaded and

(Deposition of Anson J. Mitchell.)

the expense of shipment, apportioned among the shippers?

A. I did; confirming the conversation over the 'phone I was sent the circular herewith, covering the plan in detail. In the circular you will notice my name is mentioned as having approved and agreed to said plan.

Q. Had you approved and agreed?

A. I had.

Q. I ask you if this circular which you have shown me is a correct copy of the circular put out by Rubelli's Sons?

A. This is the one I received.

Q. From Rubelli's Sons?

A. From Rubelli's Sons.

Q. Acting as agents for the vessel? A. Yes.

Mr. PLATT.—Objected to on the ground that the witness is not competent to state whether or not the document which is now about to be offered in evidence, and about which he has been interrogated, was issued with the knowledge and authority of the Oregon-California Shipping Co., Inc.; therefore that the same is incompetent; that [31] the inquiry is incompetent.

Mr. WELLES.—We except to the objection, and submit that the circular is competent, among other reasons, as a statement of the agents of the vessel with respect to the business of the vessel and her movements. I offer it in evidence.

Mr. PLATT.—Objected to on the part of the claimant on the ground that the document in question in its language expressly states that the propo-

(Deposition of Anson J. Mitchell.)
sitions therein contained are made without any authority or responsibility whatsoever as far as the steamship "Eureka" is concerned, or as far as its owners or charterers or the Oregon-California Shipping Co., Inc., are concerned; that it is plainly and on its face an attempt on the part of Rubelli's Sons, the issuers of the circular, to promote a new steamship company and to sell stock thereunder by an ingenious device therein contained, and has nothing whatever to do with this case or with the parties to the case, and is wholly, for the reasons stated, incompetent, irrelevant and immaterial to bind either the steamship "Eureka" or the claimant.

Mr. WELLES.—I take an exception to the objection on the ground that it is incompetent, irrelevant [32] and immaterial and based largely upon conclusions unsupported by evidence.

The circular is marked Libellant's Exhibit 14.

Q. Was that proposed arrangement ever carried out? A. It was not.

Mr. PLATT.—Claimant now moves to strike out Exhibit 14, if it be admitted over the objection heretofore made at the time of the offer, on the ground that it is, in view of the answer of the witness to the last question, that the arrangement therein set forth was never carried out, incompetent, irrelevant and immaterial in this case for any purpose whatsoever.

Exception.

Q. Was this voyage ever performed by the "Eureka" to California? A. No.

(Deposition of Anson J. Mitchell.)

Q. Pursuant to your bills of lading?

A. No, sir.

Q. Did you call them up about October 19th with reference to this vessel?

A. I did, and insisted that something be done immediately in order to have the goods turned over to us.

Q. Did you give them any notice at that time that there would be any claim for damage to these goods?

A. Yes, I made several demands. I made a demand on Rubelli's Sons for the goods and told them that unless [33] they would be turned over immediately that the damages would be more than what they were at the present.

Q. About what date was that demand made?

A. This first demand I think was on October 9th, 1915, the first demand that I made, and told them about the damage.

(By Mr. PLATT.)

Q. Was that oral or written?

A. Oral, in their office.

(By Mr. WELLES.)

Q. What did they say in response to your oral demand as to damage at that time?

A. Well, I can't remember just the words they used, but after I explained to them all about the goods and everything about it they said well they realized that they were in for damage claims.

Q. Did they say that they would not consider your claim or reject it at that time? A. Oh, no.

Q. Did they ever tell you they would not consider

(Deposition of Anson J. Mitchell.)

your claim as orally demanded, or would reject it?

A. Always stated that my claim would be given proper attention and also due consideration, not only by Rubelli's Sons but by Mr. Williams in person at New Orleans at the time we were unloading the boat.

Mr. PLATT.—Claimant moves to strike out all testimony of the witness both in answer to the last interrogatory and the one immediately preceding it, and any other wherein he is testifying [34] concerning oral claims or demands for damages on the ground or for the reason that the same is incompetent, as it is provided under section 6 of the bill of lading that all claims for damages must be in writing.

Mr. WELLES.—Libelant excepts and submits that the evidence is competent as tending to show a waiver of the terms of the bill of lading with respect to written claims.

Mr. PLATT.—In answer to the exception claimant states that no agent has authority to waive the provisions of the bill of lading without express authority from his principal.

Mr. WELLES.—The statement is excepted to as unsupported by any evidence.

Adjourned to 1:30 P. M.

(Deposition of Anson J. Mitchell.)

[35]

1:30 P. M.

After recess.

Present as before.

Examination of ANSON J. MITCHELL continued.

(By Mr. WELLES.)

Q. Did you have any talk with any one besides Mr. Davis and Mr. Kurz and Mr. Bates about this?

A. About the damage you mean?

Q. About the damage and the forwarding of these goods and whether the voyage was going to be completed?

A. Yes, of course I had a little talk with this man, here in New York, but it was chiefly with the owners in Philadelphia.

Q. Who was that in New York?

A. Mr. English, I think his name is.

Q. Of Phelps Brothers & Company?

A. Of Phelps Brothers & Company.

Q. Are Phelps Brothers & Company agents for this steamship here?

A. If I remember they advised me that they were appointed by the Rubelli Company to represent them in New York City.

Q. But you transacted your business in New York with respect to this steamship with Phelps Brothers & Company? A. Yes.

Q. And they were then engaged in the business of this [36] steamship, were they? A. Yes, sir.

Q. Is that the same Mr. English that signed the bill of lading, Libellant's Exhibit 1? A. Yes, sir.

(Deposition of Anson J. Mitchell.)

your claim as orally demanded, or would reject it?

A. Always stated that my claim would be given proper attention and also due consideration, not only by Rubelli's Sons but by Mr. Williams in person at New Orleans at the time we were unloading the boat.

Mr. PLATT.—Claimant moves to strike out all testimony of the witness both in answer to the last interrogatory and the one immediately preceding it, and any other wherein he is testifying [34] concerning oral claims or demands for damages on the ground or for the reason that the same is incompetent, as it is provided under section 6 of the bill of lading that all claims for damages must be in writing.

Mr. WELLES.—Libelant excepts and submits that the evidence is competent as tending to show a waiver of the terms of the bill of lading with respect to written claims.

Mr. PLATT.—In answer to the exception claimant states that no agent has authority to waive the provisions of the bill of lading without express authority from his principal.

Mr. WELLES.—The statement is excepted to as unsupported by any evidence.

Adjourned to 1:30 P. M.

(Deposition of Anson J. Mitchell.)

[35]

1:30 P. M.

After recess.

Present as before.

Examination of ANSON J. MITCHELL continued.

(By Mr. WELLES.)

Q. Did you have any talk with any one besides Mr. Davis and Mr. Kurz and Mr. Bates about this?

A. About the damage you mean?

Q. About the damage and the forwarding of these goods and whether the voyage was going to be completed?

A. Yes, of course I had a little talk with this man, here in New York, but it was chiefly with the owners in Philadelphia.

Q. Who was that in New York?

A. Mr. English, I think his name is.

Q. Of Phelps Brothers & Company?

A. Of Phelps Brothers & Company.

Q. Are Phelps Brothers & Company agents for this steamship here?

A. If I remember they advised me that they were appointed by the Rubelli Company to represent them in New York City.

Q. But you transacted your business in New York with respect to this steamship with Phelps Brothers & Company? A. Yes.

Q. And they were then engaged in the business of this [36] steamship, were they? A. Yes, sir.

Q. Is that the same Mr. English that signed the bill of lading, Libellant's Exhibit 1? A. Yes, sir.

(Deposition of Anson J. Mitchell.)

Q. I show you a letter from Phelps Brothers & Company dated October 9, 1915, and ask you if that is a letter received by you from them with reference to this shipment (handing witness paper)?

A. It is, in which they enclosed the bills of lading for the car of batteries shipped from New York.

Q. Did that letter enclose the two bills of lading that have been put in evidence?

A. No, it enclosed one of the bills of lading.

Q. It enclosed the bill of lading, Libelant's Exhibit 1, that has been put in evidence? A. Yes.

The letter referred to is offered in evidence.

No objection.

It is marked Libelant's Exhibit 15.

Q. I show you a second letter from Phelps Brothers & Company dated September 11, 1915, enclosing bills for freight, and ask you if you received that letter from them with reference to this shipment?

A. We did.

Q. Were the freight bills enclosed at the rates therein stated? A. They were.

Q. Were those bills paid? A. They were.

The letter referred to is offered in evidence. [37]
It is marked Libelant's Exhibit 16.

Q. Did those bills include the freight to the California destination? A. They did.

Q. I show you copy of a telegram to the Oregon-California Shipping Company dated October 25, 1915, and ask you if that is a duplicate carbon original of a telegram sent on that date in connection with this shipment (handing witness paper)?

A. It is.

(Deposition of Anson J. Mitchell.)

The copy of telegram referred to is offered in evidence.

Mr. PLATT.—The telegram submitted is objected to as incompetent to predicate damages, as it does not proceed in accordance with the provisions of the bill of lading, in that it is merely a warning that damages may flow, and is not a written statement of damage following ten days of the receipt of the shipment with regard to the terms of the bill of lading. Objected to at this time as incompetent on the further ground that it contains a reference to another writing by an earlier date which has not yet been introduced in evidence, and which is necessary to ascertain what is the legal force and effect of this instrument, to wit, the proposition alleged to have been forwarded by libelant to the Oregon-California Shipping Company [38] under date of 14th of October, 1915.

Mr. WELLES.—Exception.

It is marked Libelant's Exhibit 17.

Libelant also wishes it noted that any of the exhibits which may not be pertinent at the time when offered libelant expects to connect up by the evidence of this and other witnesses.

Q. Have you in your possession or under your control this telegram Rubelli wired on the 14th, which is referred to in the exhibit just mentioned?

A. I have not.

Q. Do you know what the contents of that proposition were?

A. I was advised and I was shown a telegram

(Deposition of Anson J. Mitchell.)

while in Mr. Davis's office which they had sent to the Oregon-California Shipping Company, and the gist of the telegram is practically the same as the proposition in the circular issued by the Rubelli Company, offered in evidence above.

Mr. PLATT.—I move to strike out the answer of the witness, on the ground that it is hearsay and consequently incompetent.

Mr. WELLES.—Exception. I call for the production of the telegram sent by Rubelli to the Oregon-California Shipping Company, to which the National Carbon Company informed Rubelli they would agree.

Mr. PLATT.—Claimant again advises libelant [39] that it has no documents of the Oregon-California Shipping Company, and as far as it knows any such documents, if they were ever in existence, are still in the possession of the Oregon-California Shipping Company and open to libelant to obtain in the method provided for by law and the practice in admiralty. The demand, therefore, is idle to be made upon the claimant.

Exception.

Q. I show you a copy of a telegram from F. H. Murray dated December 25, 1915, and ask you if you received that telegram? A. I did.

Q. Is this the carbon copy (handing witness paper)?

A. That is the original copy received by the operator.

(Deposition of Anson J. Mitchell.)

The copy of telegram referred to is offered in evidence.

No objection.

It is marked Libelant's Exhibit 18.

Q. What conversation or communications have you had with the agents of the vessel with respect to sending the vessel forward by way of the Straits of Magellan; tell me all that you did about that Magellan business?

A. As soon as I learned that they were figuring on a shipment by way of the Straits of Magellan I objected.

Q. When did you first learn that?

A. I cannot remember [40] the date, but I know that it was prior to October 18.

Q. How far prior do you think it was, was it on the 9th that you first took up that question?

A. I cannot tell you, just prior to the 18th.

Q. Who had proposed that the goods would be sent by the Straits of Magellan?

A. The Rubelli people told me that they had information—if I remember correctly they told me they had information from the captain that he had been ordered via the Straits of Magellan, or were trying to arrange, see if he could arrange to go that way, but the captain had advised them that owing to her being an oil burner it would be practically impossible for him to get fuel, and that would make it impracticable to go that way.

Q. Did you object to your goods going by way of the Straits of Magellan? A. I did.

(Deposition of Anson J. Mitchell.)

Q. Why did you do that, for what reason did you object to your goods going that way?

A. Because we made a demand for the goods at Colon knowing that we could get rid of them quicker and easier after taking delivery at Colon, and also the further fact that the long voyage around by way of Magellan would naturally tend to make the batteries what we call seconds instead of first-class cells.

Q. You ship a great many batteries around by way of the Canal to California, do you not?

A. We did; we are not doing it now.

[41] Q. Did those batteries show any depreciation on reaching California?

A. None, practically, whatever.

Q. Had you received any reports from your consignees for objecting to the condition in which they arrived on the usual voyages?

Mr. PLATT.—Objected to on the ground that it is immaterial what happened to other shipments.

Exception.

A. No.

Q. Were these batteries such as were capable of standing the ordinary journey to California without depreciation? A. Yes.

Q. If they were properly stowed and handled how long would it be before they would show depreciation?

A. Well, I should say—we have had them on boats—

Q. I mean under ordinary circumstances how long

(Deposition of Anson J. Mitchell.)

would you figure before they would show depreciation?

A. Between 60 and 90 days, anywheres along there it would be, it would be 90 days any way. We are shipping to the Philippine Islands and all over the country and they have had no trouble at all.

Q. And the batteries on arrival are always sold as first-class goods? A. Yes.

Q. Did these batteries ever generate any heat by themselves without any exterior heat?

A. No, no heat.

[42] Q. Then it always requires exterior heat, does it, for them to show any depreciation from that cause? A. From heat, yes.

Q. I show you a copy of a telegram dated October 26-27, 1915, from the Oregon-California Shipping Company, and ask you if that is a correct copy of the telegram received on that date (handing witness paper)?

A. That is an original copy of the telegram.

Q. Did you say original copy; was this the telegram you got?

A. We have an operator, in fact we have two operators in our department; that is the copy that she took over the wire, that is the original telegram.

The telegram referred to is offered in evidence. It is marked Libellant's Exhibit 19.

Q. I show you a day-letter dated October 27, 1915, to the Oregon-California Shipping Company, and ask you if that is a correct copy of message sent on that day? A. It is.

(Deposition of Anson J. Mitchell.)

The copy of day-letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, as being a self-serving declaration on the part of the libelant and an attempt on its part to dictate the transshipment, whereas clauses 1, 2 and 8 of the bill of lading provide under what circumstances and by whom and how the carrier has the right of transshipment [43] in case of the happening of the several conditions precedent to that right, one of which was the condition precedent which has already been detailed in evidence by the witness, and that the instrument offered is immaterial and irrelevant for the same reason, as it is incompetent.

Mr. WELLES.—Exception. We ask that your objection be made more specific.

It is marked Libelant's Exhibit 20.

Q. After your telephone conversation on October 19 did you go to Philadelphia?

A. I did; I arrived there the morning of October 22.

Q. What occurred?

A. I met Mr. Davis and Mr. Bates and had quite a talk with them. Mr. Davis and Mr. Bates both asked that I simply wait until Mr. Kurz, who was at that time in New York, returned, so I stayed over until the following day and then went to the office and detailed to them, told them what I was willing to do, told them that I was willing to take delivery down at Colon and that we would pay the expenses of the unloading of the freight and putting the other freight back into the ship, and take actual delivery

(Deposition of Anson J. Mitchell.)

at the dock, delivery of the goods at Colon.

Q. You offered to pay all expenses they might be put to in order to get your delivery? A. I did.

[44] Q. Did they agree to give you any delivery at Colon? A. They would not.

Q. Did they refuse?

A. They stated they could not.

Q. Did they state why they could not?

A. They stated they had put the matter up to their people at Portland and they could not get them to agree. They thought my proposition was more than fair.

Q. I show you a letter to Rubelli's Sons dated October 27, 1915, and ask if that is a carbon duplicate of a letter sent by you on that day (handing witness paper)? A. It is.

Q. Including the wording on the back?

A. It is.

The copy of letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, in that it is an attempt on the part of the libelant to dictate the transshipment and to inhibit the carrier from transshipment except upon libelant's price as named in the instrument now offered in evidence, in violation of the terms of Paragraph 8 of the conditions of the bill of lading, which provide that when the delivery of cargo by the carrier is prevented in consequence of a condition such as has been testified to by the witness as existing at the Canal, the captain or the com-

(Deposition of Anson J. Mitchell.)

pany (meaning by the company the carrier [45] operating the vessel) is entitled to transship whether the terminus of the voyage or not has been arrived at, and all risks whatsoever and all expenses of transshipment and all extra expenses of whatsoever kind incurred shall be entirely for the account of the shipper, consignee or party claiming the goods.

Exception.

It is marked Libelant's Exhibit 21.

Q. Did you receive any reply to this letter?

A. No, sir.

Q. I show you a copy of a telegram to Rubelli's Sons dated November 3, and ask you if that is a correct copy of the telegram sent by you to them on that date (handing witness paper)?

A. It is.

The copy of telegram referred to is offered in evidence. It is marked Libelant's Exhibit 22.

Q. I show you a day-letter dated November 3, addressed to the Oregon-California Shipping Company, and ask you if that is a correct copy of the message sent to them on that date?

A. It is.

The day-letter is offered in evidence. It is marked Libelant's Exhibit 23.

Q. I show you a copy of a telegram dated November 3, 1915, and ask you if that is a correct copy of a telegram received by you on that date?

A. It is.

[46] The telegram is offered in evidence. It is marked Libelant's Exhibit 24.

Q. I show you a copy of a day-letter dated November 4, 1915, to the Oregon-California Shipping Com-

(Deposition of Anson J. Mitchell.)

pany, and ask you if that is a correct copy of the message sent to them on that date? A. It is.

The copy of day-letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, the filing of the claim for damages not being in accordance with Paragraph 6 of the conditions of the bill of lading, requiring that claims for damages be presented to the carrier within 10 days after actual delivery to the consignor or consignee, it being a matter of pleading in the libel that delivery was had by the carrier and accepted by the libelant on November 22 and November 23, 1915.

Exception.

The day-letter is marked Libelant's Exhibit 25.

Q. I show you a telegram dated November 5th, 1915, signed Charles Kurz, and ask you if that is a correct copy of a day-letter received by you on that date? A. Yes.

The telegram is offered in evidence. It is marked Libelant's Exhibit 26.

[47] Q. I show you a copy of a day-letter dated November 5th, to the Oregon-California Shipping Company and ask you if that is a correct copy of a message sent to them on that date? A. It is.

The copy of day-letter is offered in evidence.

Mr. PLATT.—Objected to as incompetent, as a claim for damages under Article 6 of the conditions of the bill of lading, in that it was not made within 10 days of the actual delivery to and receipt by the libelant of the subject matter of the shipment, which

(Deposition of Anson J. Mitchell.)

was delivered and received on November 22 and November 23, 1915.

Exception.

The copy of day-letter is marked Libellant's Exhibit 27.

Q. After you sent that message, what did you do, Mr. Mitchell?

A. I heard nothing from Rubelli, and called them up on the long distance 'phone asking them to let me know what they knew. They told me that they had been informed by—that the boat had left for New Orleans on or about November 6th, but that the cargo would be transshipped, and that Mr. Kurz or Mr. Williams, manager of the Oregon-California Shipping Company, would communicate with us.

Q. Did they tell you that Mr. Williams was the manager [48] of the Oregon-California Shipping Company? A. They did.

Q. Had you had any other information that the vessel was going to New Orleans?

A. That was the first definite information I had.

Q. Had you been consulted at all as to her going to New Orleans before this?

A. I am wrong there, I wish to correct my statement, on October 25th we received a telegram through Mr. Murray, that they were going to divert the ship to New Orleans.

Q. Had you consented to that diversion?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial on the ground that Sections 1, 2 and 8 give the carrier the right of diversion and

(Deposition of Anson J. Mitchell.)

transshipment under a state of facts such as the witness has already testified to at the Panama Canal, and that the consent of the consignor or consignee under such circumstances is not a condition precedent to the right of transshipment.

Exception.

A. No, except that on October 27th I wired them as per my day-letter of October 27th (referring to exhibit 20).

Q. Aside from this message had you given any consent to the boat going to New Orleans?

Mr. PLATT.—Same objection as to the last preceding [49] question.

Exception.

A. I don't think I did; I am quite sure I didn't.

Q. After this telephone conversation of November 8th, what did you do?

A. I heard nothing from them, and called Rubelli's Sons up again on the wire on the morning of the 11th, and was told that Mr. Kurz, accompanied by one of the managers,—I think he said managers, one of the big bugs,—one of the managers, would be in Chicago on the way to New Orleans, and that I should get in touch with them if I wanted to see them. Mr. Kurz would be in Chicago on the 12th.

Q. I show you a telegram dated November 11th, 1915, and ask you if that is a correct copy of the message sent by you to Mr. Kurz on that date?

A. It is.

The copy of telegram is offered in evidence. It is marked Libellant's Exhibit 28.

(Deposition of Anson J. Mitchell.)

Q. I show you a message dated November 11, 1915, signed John Dwyer, and ask you if that is a correct copy of the message received by you on that date?

A. It is the original copy.

The telegram is offered in evidence.

Q. When you say original copy, do you mean the copy received by your own telegrapher at the Cleveland plant? A. Yes.

[50] Q. Were all the messages in connection with this matter addressed to you at the Cleveland plant and received by your own telegrapher there?

A. Addressed to me at the Cleveland plant, yes.

The telegram is marked Libelant's Exhibit 29.

Q. Who is the Mr. Dwyer who signed this message?

A. He is the agent for Phelps Brothers at Chicago, who are acting as agents for Rubelli's Sons.

Q. Did Rubelli's Sons or Phelps Brothers ever tell you that he was their agent?

A. Yes, and I think their letter-heads show that. I have been in their office several times—called a number of times.

Q. Whose letter-heads? A. Mr. Dwyer's.

Q. Have you any of those here? A. No.

Q. I show you a message dated November 11, 1915, addressed to Mr. Dwyer and ask you if that is a correct copy of the message sent on that date?

A. It is.

The telegram is offered in evidence. It is marked Libelant's Exhibit 30.

Q. What did you do after these messages?

(Deposition of Anson J. Mitchell.)

A. I got on the train, went to Chicago, met Mr. Kurz and Mr. Williams, went with them to New Orleans. I stopped off at Memphis, of course, but we both went to New Orleans. I stopped off at Memphis a day.

Q. What did you find at New Orleans?

A. I found that [51] the boat "Eureka" had arrived there, and that some of our goods, a very few, were unloaded. No, I beg your pardon, they were not unloaded then; I found that the steamship "Eureka" had arrived there, but our goods were not unloaded until Tuesday or Wednesday, and the balance was unloaded November 22 and 23, 1915.

Q. Did you see your goods there? A. I did.

Q. Were they the same goods which had been shipped from your Cleveland factory?

A. They were.

Q. Did you see them being unloaded from the vessel?

A. I did see some of them, not all of them,

Q. Did you examine them? A. I did.

Q. What did you find?

A. I found quite a number of the barrels were broken open and after I made a test as to amperage and voltage, seeing the condition of the goods, I decided that they were not in a condition to ship out to our customers, so I immediately endeavored to make arrangements with the railroad company, and did succeed, in order to get the goods sent back to Jersey City.

Q. How many of the barrels were broken, what

(Deposition of Anson J. Mitchell.)

portion of the barrels were broken, quarter or half or what?

A. Ten or fifteen per cent were broken.

Q. Were any of them crushed in?

A. Yes, some were crushed in, I don't want to say it was ten or fifteen per cent, perhaps it was; well, it was in the neighborhood [52] of 10 per cent.

Q. What was the nature of the damage to the batteries?

Mr. PLATT.—Objected to on the ground that any proof of damage in compliance with the terms of Article 6 of the conditions in the bill of lading, unless it be expressed in writing and delivered to the carrier within 10 days after the goods are actually delivered to the consignor or consignee, is valueless, and for these reasons the answer to the inquiry as formed is incompetent, irrelevant and immaterial.

Exception.

A. The batteries showed that they had been subjected, as far as I could distinguish, to extreme heat, I presume that we could offer more of a scientific reason why, by our chemist, whom I can bring over here, but to my mind, and I have inspected hundreds of shipments, the batteries were not what we would term first class. A great number of them that I tested I found the amperage running lower than what they should, and also the seal on the cell showed the imprints of the straw, which tended to show, of course, that the heat had been excessive, and naturally began to melt the wax. This seal is nothing

(Deposition of Anson J. Mitchell.)

more or less than a composition of sealing wax, pitch and tar.

Mr. PLATT.—Claimant moves to strike out [53] answer of the witness above for the reasons and on the grounds heretofore urged as to its admissibility, and also on the further ground that the damage as detailed by the witness in his completed answer is excepted under Clauses 1, 2, 3 and 8 of the bill of lading as heretofore detailed at length by counsel for claimant in answer to the request of counsel for the libellant, and for all of those reasons it is incompetent, irrelevant and immaterial.

Mr. WELLES.—Exception on the ground that the objection is incompetent, irrelevant and immaterial, among other reasons because it does not appear that the circumstances of the present case are within the exceptions of the bill of lading, or that the paragraphs referred to are applicable.

Q. Could you judge from what you saw of the batteries at New Orleans whether the heat that had caused the damage had arisen from within the goods themselves, or from exterior sources?

Mr. PLATT.—Objected to on the same grounds as those to the next preceding interrogatory.

Exception.

A. I could not say technically, but judging from my experience—I can explain that this way, if any heat [54] comes, or if any damage is sustained through the cell of itself, it will begin to corrode and show up around on the zinc, which is the container. Of all the cells that I examined at that time none

(Deposition of Anson J. Mitchell.)

showed this corroding, though all showed an apparent outside damage, or in other words, the damage was sustained from causes outside of the cell and not of the cell itself.

Mr. PLATT.—I move to strike out the answer of the witness for the same reasons as to the answer to the preceding interrogatory.

Exception.

Q. Had you ever seen any cells which might heat up themselves sufficiently to soften the wax under the circumstances in which these cells were?

A. Not from the word heat, but I have seen cells which analysis showed had some foreign material, such as iron, and that would create what is termed an excitement; those would have this corroding.

Q. Would they show any melting of the seals?

A. No, they would not show any melting of the seals.

Q. Have you seen any batteries which showed a melting of the seals due to causes within the batteries themselves? A. No, I never have seen any.

Q. Will you state briefly how these cells were packed?

A. Yes, they were all—do you mean after they came [55] from the testing room?

Q. How these cells were packed?

A. They take an empty barrel and place a layer of straw in it, pack it down very securely, then we take a number of batteries, as many as will go in a barrel, as one layer. Then straw is taken and forced between the batteries and the barrel, inside of the bar-

(Deposition of Anson J. Mitchell.)

rel, then another layer of straw is placed on top of that, and the same process followed until we have three layers of batteries in one barrel, with cushions, of course, in the top and bottom and between and also around the sides, of straw.

Q. The barrels are filled that way and a head put on, is that right?

A. The barrels are filled and the head is put on and properly marked.

Q. Is there anything put around the cell itself?

A. Well, there is a paper of jacket which is used as advertising matter and also to keep the zinc from coming in contact with another cell or other metallic substance.

Q. Is that of paper or carboard?

A. Cardboard, chip board is what it really is.

Q. How are these cells made up, what is the construction of one of them?

A. We first make a container $2\frac{1}{2}$ inches in diameter by 6 inches high of sheet zinc, 8 or 9 gauge or whatever we want, according to the kind of cell we wish. [56] This can is then taken and placed in what is termed a pocket or cart, and taken to where a paper lining is placed within the can. It is then taken to what is termed a tamping machine. At this tamping machine they place a carbon stick in the center of the can and force the constituent elements of the mix, which usually consists of manganese ore, carbon flour and a few other secret ingredients, around it; this mix is fed into the can, and by machinery tamped down into the can around the carbon

(Deposition of Anson J. Mitchell.)

stick. There is then a paper cap placed on top of the cell, and it is taken from there to the sealing vat where the sealing wax is poured into the remaining part of the can, filling it up completely. It is then taken to a connecting department where the connections are placed on. They are then tested as to voltage and amperage, and are then allowed to stand four to six days with nothing done. They are then tested again, and if found to be what is termed first-class cells are sent to the packing department. At the same time there is sent from the jacket department a jacket cover, in which these zinc cans are placed, and this jacket discriminates the kind of cell; they are then placed into the jackets and again re-tested and if found O.K. go direct to the packer and are placed in the barrels as outlined above.

Q. Is the outside of the jacket stamped with any marks?

[57] A. The outside of the jacket is stamped; yes, sir, each and every battery that is made is made on what is termed a shop order, the shop order emanates from the factory order or shipping order. The shipping order bears a number, a serial of some kind; it may have the particulars to designate as to what kind of cells or to designate to whom it is going. This number is carried through the jacket department as well as the manufacturing department, and on each and every jacket the date of the manufacture of the cells as well as the order number, or if we call it shipping order, is shown. This is not true, of course, in the regular common ordinary goods which

(Deposition of Anson J. Mitchell.)

we ship out to the trade in and around the immediate vicinity of the factory, but on all long distance hauls, this course is always pursued.

Q. These goods were what is known as long distance goods? A. Long distance cells.

Q. Are the long distance cells of any extra or special quality?

A. They are tamped a little harder, a little more care is placed in them, so that the amperage and quality of the cell will be as good when they arrive at destination as they will if shipped to a nearby territory.

Q. Do you make any better quality of cell than these long distance cells?

A. No, we do not; that is the best cell we make.

[58] Q. Are they designated on the outside of the jacket with the quality they are? A. They are.

Q. Did you notice such marks on these cells when you examined them at New Orleans?

A. On the bottom of them, yes; each one that I tested had either the consignment number, 90, 99, 101, 114, or 102.

Q. What did these marks indicate?

A. That the goods were the actual goods shipped from our factory on the dates as specified.

Q. Did the marks indicate anything as to the quality of the goods at the time they were shipped from your factory, as to whether they were first class or not?

A. Well, not the marks, except that we knew from the marks that they were special cells made under

(Deposition of Anson J. Mitchell.)

special instructions, which cover long distance cells.

Q. Then the marks indicated that these cells were long distance cells, is that right? A. Yes.

Q. Did you examine the interior of any of these cells at New Orleans? A. No, sir; I did not.

Q. Were the jackets in good shape when you examined them at New Orleans?

A. Some were and some were scuffed.

Q. What proportion would you say were scuffed?

A. Of course, I did not test more than 25 barrels, about 25 barrels I made a test of.

Q. Did you select these barrels at random?

A. Yes, [59] any place and every place, so that they would be representative cells.

Q. You testified that they were not suitable to be sold? A. Yes.

Q. Who was there at that time, attending to the business of the ship at New Orleans?

A. There was Mr. Williams, manager of the Oregon-California Shipping Company, Mr. Kurz, of Rubelli's Sons, and a gentleman representing the Lumber Company, I met him, I didn't get acquainted with him.

Q. What was done after you made these tests?

A. I told Mr. Williams the goods were damaged, told Mr. Kurz that the goods were damaged, and that he would have to send them back to the factory in order to put them in first class shape so as to get rid of them; in other words, obtain as much salvage as possible.

Mr. PLATT.—Claimant moves to strike out the

(Deposition of Anson J. Mitchell.)

answer to the last interrogatory in so far as any claim was alleged therein as being in compliance with Section 6 of the bill of lading as to notice of damage, on the ground that that clause provides that written demand must be made within ten days after delivery, and no oral notification of claim of damage is competent within the provisions of that clause of the bill of lading, consequently the answer is incompetent, irrelevant and immaterial.

[60] Exception.

Q. Could you tell the exact extent of the damage there, without sending them back to the factory at that time?

A. It would be utterly impossible to do so, unless we took each and every barrel and unpacked it, and there would be no means of placing or putting the cells in shape for re-sale, if any were damaged, and those that I had examined were damaged.

Q. Were any of the cells crushed or out of shape, the cells themselves, oval or anything like that?

A. I think there were a few; yes, there were a few, but very few.

Q. Did many of them show bulged seals?

A. A few showed seals as running off the side, those that I examined; yes, you would call them bulged seals.

Q. From the conditions you saw, what did you conclude was the cause of the damage?

A. I concluded they had stayed in the hold of the ship where it was too hot.

Q. And what else had happened, anything?

(Deposition of Anson J. Mitchell.)

A. Practically that is all, and the delay, of course, naturally, being old cells, not strictly fresh cells.

Q. Did they show any signs of rough handling?

A. Some of the barrels were fairly well handled by the stevedores.

Q. You stated that some barrels were smashed?

A. Yes, a few.

Q. Did any of the cells have corroded caps?

A. I don't know if there were, only a few of these few that I tested.

[61] Q. What was done with that shipment after that?

A. The goods were loaded *unto* cars, three different cars, and on November 23d, although the goods had been loaded in the car four or five days, the railroad company released and permitted us to send them on to Jersey City.

Q. What were Mr. Kurz and Mr. Williams doing down there at that time?

A. They were arranging for the transshipment of the goods.

Q. Of your goods?

A. Yes, not only that, all the goods on this boat.

Q. Did you superintend the loading of these cars at New Orleans personally yourself?

A. I did, personally myself.

Q. Did you get the bills of lading for the goods that were issued there? A. I did.

Q. On what railroad were they shipped?

A. New Orleans & Northeastern.

(Deposition of Anson J. Mitchell.)

Q. Where were they shipped to?

A. They were shipped from the Chalmette Docks, which, as I understand, is the property of the railroad company, and shipped to our works at Jersey City.

Q. Immediately after landing?

A. No, probably a week or 10 days after landing.

Q. What was the reason for the delay?

A. I guess the [62] real reason was on account of financial matters between the railroad company and the steamship company.

Q. Had you asked to have that shipment sooner?

A. I had asked to have them loaded five days sooner than they were shipped.

Q. I show you a bill of lading headed New Orleans & Northeastern Railroad Company and ask you if that is the bill of lading issued to you for these goods. A. It is, it bears my signature.

Q. For all of the goods?

A. For all of the goods that were turned over.

Q. Was the freight prepaid on this shipment?

A. It was.

Q. Who paid the freight? A. I did.

Q. Are the correct amounts of freight paid stated in that bill of lading?

A. I have every reason to believe yes.

Q. Was the entire shipment shipped to Jersey City by you?

A. Yes, there was one case which we could not find at New Orleans.

Q. Was that case ever delivered to you by the

(Deposition of Anson J. Mitchell.)

steamship "Eureka"? A. Never.

Q. Was the shipment the same as originally shipped except for this shortage and the damage?

A. Yes, sir.

Q. Did those goods reach their destination at the [63] Jersey City plant? A. They did.

The bill of lading is offered in evidence.

Mr. PLATT.—It is objected to as incompetent, irrelevant and immaterial, because paragraph 8 of the libel pleads that the cargo which is the subject of this action was delivered by the carrier to the libelant at New Orleans, La., and it is not of interest in this suit, or material what the libelant did with them in the transportation or otherwise thereafter.

Exception.

It is marked Libelant's Exhibit 31.

Q. When you took the goods from the steamship company at New Orleans, did you consent that the steamship company should be relieved from responsibility in the matter?

Mr. PLATT.—Objected to on the ground that it is asking the witness for a conclusion of law, and this inquiry is as to matters of fact and the witness cannot usurp the functions of the court to pass on these matters; the libel having pleaded a delivery of the goods by the carrier to the libelant, the legal effect of that act is a matter for the Court, and the inquiry is incompetent, irrelevant and immaterial for any purpose.

[64] A. No, sir.

Q. Did you make any explanation as to why you

(Deposition of Anson J. Mitchell.)

were shipping these goods to Jersey City?

A. I did.

Q. What? I told them that the way the goods were we could not ship them out to the customers, and that we had no facilities to put them in condition to do so, that we would ship them back to our factory and have them reconditioned and sent out, and that I would render a claim and make it as light as possible after we ascertained the damage. Mr. Williams told me at that time that he didn't care how much or what the claim was, that they had protected themselves against such claims by taking out an insurance policy covering all claims over \$500 of any kind.

Mr. PLATT.—Claimant moves to strike out the answer of the witness on the ground, or for the reason, that the same is incompetent, as well as immaterial and irrelevant, because the contract between the National Carbon Company as shipper and the Oregon-California Shipping Co., Inc., as carrier, is defined by the bill of lading, Libelant's Exhibits 1, 3 and 5, and the expression of one of the officials of the Oregon-California Shipping Co., Inc., as detailed by the witness, of his lack of concern as to the size of the claim that [65] might be preferred by the libelant in the future does not rise to the dignity of a modification of the bill of lading so as to be a binding contract between the parties, or to a waiver of any of the legal rights of the owners of the vessel or their successors, in interest.

Exception.

Q. Did Mr. Williams or Mr. Kurz or any of the

(Deposition of Anson J. Mitchell.)

other agents of the vessel present see this cargo with you while you were there? A. Yes.

Q. Did they know its condition?

Mr. PLATT.—Objected to unless you define who he is talking about.

A. Yes, both Mr. Williams and Mr. Kurz.

Q. I was going to say, which of the agents were present?

A. Both, and the captain, of course, of the boat.

Q. Did you state to them that you were going to make a claim for the damage?

Mr. PLATT.—Objected to on the ground that the bill of lading defines under Clause 6 “the claim must be in writing” and an oral assertion of the intention to present a claim cannot be considered under the contract between the parties as being a claim, hence it is incompetent, irrelevant and immaterial.

[66] Exception.

A. I did.

Q. Did they ask you to make any claim in writing at that time?

Mr. PLATT.—Objected to as immaterial whether they asked that such a claim be made. The contract itself provides for the action to be taken by the shipper and the answer sought to be elicited is incompetent, irrelevant and immaterial.

Exception.

A. No.

Q. Did they ask you as to how much the shipment was damaged, your estimate of it?

A. Yes—they didn't ask me it that way, but we

(Deposition of Anson J. Mitchell.)

were talking, and they did ask as to about what extent the things were damaged, to which I replied it would be impossible for me to tell until after the tests were made at our factory.

Q. Did you call their attention to the fact that you had mentioned the damage in telegrams before this?

A. You mean at New Orleans.

Q. Did you refer to your previous telegrams in respect to the damage?

A. I can't say that it was referred to in that way, the whole matter was talked of and discussed several times by both Mr. Williams, Mr. Kurz and myself.

Mr. PLATT.—Claimant renews its objection to both of the last three interrogatories and [67] moves that the answers be stricken out for the same reasons as last outlined concerning inquiries of the same character.

Exception.

A. It was thoroughly understood by Mr. Williams and Mr. Kurz that there would be a claim for damages.

Same motion. Same exception.

Q. Did they say anything as to what would be done about paying the claim if you put one forward?

Same objection. Same exception.

A. Yes.

Q. What did they say?

Same objection. Same exception.

A. Mr. Williams stated that he himself was financially ruined, that this Oregon-California Shipping Company or this contract they had entered into

(Deposition of Anson J. Mitchell.)
would financially ruin him.

Q. Which contract?

A. With the Crossett Western Lumber Company.

Q. The charterers of the vessel?

A. Yes, it would ruin him, but that I would be protected and my claim would be protected by this bond or insurance which he had taken out covering all claims of any kind over \$500.

Mr. PLATT.—Claimant moves to strike out the answer for the same reasons as heretofore detailed as to the same.

Exception.

[68] Q. I show you a copy of a letter dated December 1, 1915, addressed to Phelps Brothers & Company, New York City, and L. Rubelli's Sons of Philadelphia, and ask you if that is a correct copy of a letter sent to those two firms on that date?

A. It is.

Q. That letter was sent by you as traffic manager of the National Carbon Company? A. Yes, sir.

The letter is offered in evidence.

Mr. PLATT.—Objected to on the ground that if it is intended that the document tendered should be considered as a claim under Clause 6 of the bill of lading requiring that a written demand for the damage should be made upon the carrier within ten days after actual delivery of the goods, the same is too late, because it appears from Libellant's Exhibit 31 that the bill of lading was issued to the libellant for these goods on November 20, and it must have received the goods from the carrier prior to Novem-

(Deposition of Anson J. Mitchell.)

ber 20th. Objected to on the further ground that the document tendered in evidence does not comply with the requirements of Section 6 of the conditions of the bill of lading, in that it is not a claim, but a mere notice of an intention to present a claim, and for both and all of these reasons it is incompetent, irrelevant and immaterial [69] and on the further ground that it is not presented to the carrier, but is addressed to the shipping agents who had to do with the solicitation of the freight, as detailed in evidence by the witness, and does not, for that reason, comply with Section 6 of the conditions of the bill of lading, and is incompetent, irrelevant and immaterial.

Exception.

It is marked Libelant's Exhibit 32.

Q. Did the steamship "Eureka" or her agents or owners or charterers make any request for any more specific claim from you than contained in this letter last offered in evidence?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, because the bill of lading, Libelant's Exhibits 1, 3 and 5, define the character of the claim which must be presented for damage to cargo as contended for and as against the owner of the vessel or the vessel or the successor in interest to the owner of the vessel, and it is not within the power of the Oregon-California Shipping Company to waive the provisions of the bill of lading, neither is the inquiry sufficiently explicit to produce a legal waiver, if answered in the affirmative, therefore

(Deposition of Anson J. Mitchell.)

[70] it is incompetent, irrelevant and immaterial.

Exception.

A. No.

Q. When were the goods delivered to you at New Orleans, Mr. Mitchell?

A. November 23d; the bill of lading was issued by the railroad November 20, when the goods were loaded, but was not delivered to me until the 23d.

Mr. PLATT.—I move to strike out the answer on the ground that the libelant is bound by its Exhibit 31, introduced in evidence, which shows legal title in the libelant to these goods, and the affirmation of itself in tendering this exhibit as evidence, and the action of the railroad company in issuing the bill of lading therefore it is incompetent to attempt to deny the authenticity of its own exhibit heretofore presented in evidence, therefore the inquiry becomes immaterial, and the testimony should be stricken out for those reasons.

Exception.

Q. When was this bill of lading delivered to you or to your company?

A. Either November 24th or 25th, I forgot which it was, it was delivered to me by Mr. Tate, who is the general agent for this road, and he stated that until financial arrangements were completed between the agents [71] of the steamship "Eureka" and the Crossett Western Lumber Company's attorney and his railroad that they would not deliver any bills of lading or any of the cargo to any one or even allow it to leave Chalmette Docks or yards.

(Deposition of Anson J. Mitchell.)'

There had been a controversy regarding the advancement of freight charges accruing on a great number of shipments contained in the boat, covering the shipments from Philadelphia and New York, in other words, a great number of people had allowed their goods to come forward freight charges collect, instead of prepaid, and the question arose with the railroad companies as to the legal right of their advancing to either the steamship company, their agents, or any one, moneys covering the freight charges from New York or Philadelphia to the port of delivery, which in this instance was New Orleans. The Southern Pacific, to whom the boat's cargo was originally intended to go, refused to advance any moneys on this cargo, which necessitated the boat leaving the Southern Pacific docks and going over to the Chalmette Docks, which in this instance is a belt line controlled by the New Orleans & Northeastern Railroad Company, from which deliveries to all the railroads in the city can be made. The arrangements for collecting of these charges were afterwards adjusted, as I understand it, between one of the representatives of the Santa Fe System and also one of the 'Frisco systems, and for that reason no goods [72] were permitted to be turned over to anyone demanding them or to any of the railroads until that legal question was cleared up.

Mr. PLATT.—I move to strike out the answer of the witness on the same grounds, offered as objections to the last preceding interrogatory, on the motion to strike out the answer thereto.

(Deposition of Anson J. Mitchell.)

Exception.

Q. Had any of these goods left the control of the S. S. "Eureka" before November 23d?

Same objection and motion. Same exception.

A. No, sir.

Q. Did Rubelli's Sons or Phelps Brothers & Company or the S. S. "Eureka" make any reply to your letter of December 1, Mr. Mitchell?

A. They did.

Q. I show you a letter from Rubelli's Sons dated the 3d of December, 1915, and ask you if that is the reply? A. That is the real reply.

The letter is offered in evidence. It is marked Libellant's Exhibit 33.

Q. Mr. Williams called on you at the hotel in New Orleans, did he not? A. He did.

Q. What hotel were you stopping at?

A. De Soto.

Q. I show you a card with the name of Mr. Williams on it, and ask you if that is the card left at the hotel [73] De Soto by him, for you?

A. This card I found in my box when I came back from some part of the city,—I don't know just where it was, and immediately after getting same—not immediately, the following morning after getting same I went over to the St. Charles Hotel and had an interview with Mr. Williams and Mr. Kurz, and Mr. Williams then told me that he had left the card there for me, which is this one.

Q. Is that the stamp of the Hotel De Soto on the back of that card? A. It is.

(Deposition of Anson J. Mitchell.)¹

Q. Does that stamp show the time it was left at the hotel? A. It does.

The card is offered in evidence. It is marked Libelant's Exhibit 34.

Q. I show you a letter from Phelps Brothers & Company dated December 9th, and ask you if that is the letter received by you from them on or about that date? A. It is.

The letter is offered in evidence. It is marked Libelant's Exhibit 35.

Mr. PLATT.—Objected to for the same reasons as those heretofore urged to Libelant's Exhibit 32.

Q. When did these batteries arrive at your Jersey City plant?

A. As reported to me by the receiving clerk, received on December 6, 1915.

[74] Q. I show you a copy of a letter dated December 6th, to Rubelli's Sons and Phelps Brothers & Company, and ask you if that is a correct copy of a letter sent by you to them on that date?

A. It is.

Q. The duplicate original sent by you to them on that date? A. Yes, sir.

The letter is offered in evidence.

Mr. PLATT.—It is objected to on the following grounds: first, the same grounds as those heretofore interposed on the offering of Libelant's Exhibit 32, and upon the additional ground that more than 10 days had elapsed since the delivery of the cargo to the libelant, and it was too late, under Clause 6 of the conditions of the bill of lading to present a claim,

(Deposition of Anson J. Mitchell.)

and upon the further ground that as shown by Libelant's Exhibit 33, L. Rubelli's Sons and Phelps Brothers & Company had, under date of December 3, 1915, notified the libelant that they were not the agents of the Oregon-California Shipping Company, to whom a claim should be presented, but were merely the agents for solicitation and providing for cargo, and therefore the instrument now offered in evidence is incompetent, irrelevant and immaterial as not presented to the carrier under said Section 3 of the bill of [75] lading.

Exception.

It is marked Libelant's Exhibit 36.

Q. I show you a letter dated December 8, 1915, to you from Rubelli's Sons, and ask you if that is a letter received by you on or about that date?

A. It is.

The letter is offered in evidence.

No objection.

It is marked Libelant's Exhibit 37.

Q. Did you receive any reply to your letters with reference to the damage, sent subsequent to your arrival in New Orleans, other than the letters already offered in evidence?

A. I think I did, I think I have a letter from the Oregon-California Shipping Company, I think I have got a letter from Mr. Williams' office acknowledging receipt of the claim.

Q. I show you a letter dated January 11, addressed to L. Rubelli's Sons, Phelps Brothers & Company, and the Oregon-California Shipping Company, and

(Deposition of Anson J. Mitchell.)

the Mannheim Insurance Company, New York City, and ask you if that is the duplicate original of the letter sent to those firms on that date? A. It is.

The letter is offered in evidence.

Mr. PLATT.—It is objected to on the same grounds as Libelant's Exhibit 32.

[76] Exception.

It is marked Libelant's Exhibit 38.

Q. I show you a letter headed L. Rubelli's Sons, dated January 13th, 1916, and ask you if that is a letter that was received by you?

A. Yes, on January 14th.

The letter is offered in evidence. It is marked Libelant's Exhibit 39.

Q. I show you a letter dated January 13, 1916, under the heading Phelps Brothers & Company, and ask you if that is the original letter received by you?

A. It is.

The letter is offered in evidence.

Mr. PLATT.—Objected to on the same grounds as urged to Libelant's Exhibits 32 and 38.

Exception.

It is marked Libelant's Exhibit 40.

Q. I show you a letter dated Portland, Oregon, February 12, 1916, addressed to the National Carbon Company, and ask you if that is the original letter received by you?

A. Yes, received by us on February 17th.

The letter is offered in evidence.

Mr. PLATT.—Objected to for the same reasons as those heretofore offered as to Libelant's Exhibit

(Deposition of Anson J. Mitchell.)

32, and on the further ground that the carrier is not bound by any alleged admissions or [77] statements that are in conflict with the provisions of Section 6 of the conditions of the bill of lading providing for the time, form and manner of presenting claims of damages, all of which provisions at all times the claimant and the ship claim the full benefit of without the right of waiver on the part of anybody whomsoever, and for all these reasons the document is incompetent, irrelevant and immaterial.

Exception.

It is marked Libelant's Exhibit 41.

Q. What was done with these goods after they got to your factory at Jersey City?

A. We inspected each and every battery, unpacked them and inspected them and put them out in new jackets, and retouched the cells and sent them out, or as many as we could possibly use.

Q. That is a branch of the National Carbon Company?

A. Yes, under the Cleveland management, and follows the same plan as at Cleveland.

Q. The same methods and marks are followed at all your factories, aren't they? A. Everything.

Q. When these goods were shipped out the second time did they go out as new goods or a lower grade?

A. The majority of them went out as a lower grade.

Q. Was there any difference in the market for batteries at that time, than at the date when they were [78] originally consigned?

Mr. PLATT.—Just let me make one objection here,

(Deposition of Anson J. Mitchell.)¹

which will be a continuing one. The claimant objects to all interrogatories and answers thereto which relate to matters of damage subsequent to the delivery of the goods by the carrier to the libelant at New Orleans on the ground that they are immaterial, and any proof concerning them is incompetent and irrelevant because no claim was presented to the carrier in accordance with provision 6 of the conditions of the bill of lading, within 10 days after the delivery, and it may be considered that the objection is continued on all inquiries of that nature. I object further to the question and to all questions of a similar character on the ground that they are incompetent, irrelevant and immaterial, because the witness has already testified that the depreciation in the cells was due to heat and the length of time they were in the hold of the vessel, and both of said causes testified to by the witness as the cause of the depreciation are within the exceptions of paragraphs 1, 3 and 8 of the conditions of the bill of lading, and not the foundation of a claim between the parties, or a claim of damage against [79] the vessel.

Exception.

A. There was a two cent difference; at the time of shipping them out, had we been able to sell them at that time we would have gotten two cents a cell more than what we got when we really sold them.

Q. When you finally shipped them?

A. When we finally shipped them.

Q. There had been a two cent drop in the market from the time the batteries would have originally

(Deposition of Anson J. Mitchell.)

reached their destination to the time when they were actually resold? A. Exactly.

Q. Assuming, Mr. Mitchell, that a shipment of batteries such as these were placed on board a vessel on the dates testified to, and went forward through the Panama Canal at this time of year, in the ordinary course of matters would they show any depreciation at their California destination?

A. Practically none.

Q. If a shipment of these batteries left New York on or at the time of year testified to and arrived at Colon or in the Canal Zone in the ordinary running time, say of about 12 days, and were delayed there for a period of a few days, and then were returned to New Orleans in the same vessel, would they ordinarily show any signs of depreciation?

Mr. PLATT.—Objected to on the grounds [80] previously stated, and on the further ground that the witness has not shown that he has had any experience in so shipping via the route which is assumed as the basis for the inquiry, therefore he is incompetent to express an opinion on a state of facts concerning which he has not shown any experience.

Exception.

A. No.

Q. Did you have any experience with other shipments of batteries on other vessels from New York to Panama Canal which had been turned back at about this time?

A. Yes, there were two carloads of dry batteries delivered to a steamship company and this steamship

(Deposition of Anson J. Mitchell.)

proceeded to the canal, to Colon, and was unable to get through on account of the slide. After laying there for two or three days the steamer returned and brought the batteries back and delivered them to us at Jersey City.

Q. Where did the steamer land at, at what port?

A. New York or Brooklyn, I don't know which.

Q. Returned to New York?

A. Yes, returned to New York.

Mr. PLATT.—I move to strike out the testimony of the witness in response to the last inquiry on the ground that it is incompetent, irrelevant and immaterial because, as shown by the evidence elicited [81] so far by the witness in this case, the carrier in the handling of the goods shipped by the libelant at all times did it in accordance with the provisions of the bill of lading between the parties, and no claim for damages can be predicated upon what happened to some other shipments which may or may not have been handled in a different way under a different bill of lading, or a similar bill of lading, unless it be shown that the carrier in this case did convey the cargo belonging to the libelant contrary to the provisions of the bill of lading, and for all these reasons the testimony should be stricken out.

Q. Does heat and the ventilation of the place in which dry batteries are stored affect them?

A. It does.

Q. What effect does it have?

A. It tends to shorten the life of a dry battery; it also tends to melt the wax and naturally creates

(Deposition of Anson J. Mitchell.)

a quicker deterioration of the life of a cell.

Q. Does it affect the seals?

A. It does, it melts the wax, which is the seal, and as soon—for instance, if the wax is melted it will permit air to strike into the interior of the battery, and the interior of the battery must contain moisture, or it will not work. In other words, just as soon as the moisture of a battery is absorbed then [82] the battery is dead. You can take a dead battery to-day, break open the seal and pour in water or a solution of sal-ammoniac, and restore a certain percentage of the life of that battery, but it will, of course, only be a short life, it is only a temporary relief.

Q. And if the seals are melted or softened in that way, does that cause the batteries to leak, would they show any signs of leakage?

A. Yes, that would permit it, that makes them unmarketable.

Q. Why?

A. Because the customer realizes that something abnormal has been given to these batteries.

Q. Did any of the batteries examined by you at New Orleans show signs of leakage?

A. They showed signs of the pitch being melted, but they had showed signs—I cannot tell distinctly without internal examination and I was not in condition to do that.

Q. Any stains on the jackets?

A. Some of them had a little scuff; I don't know, I don't remember.

(Deposition of Anson J. Mitchell.)

Q. Have you had any actual experience on vessels, Mr. Mitchell? A. Myself?

Q. Yes? A. Oh, yes.

Q. What was it?

A. I was agent for the Union Transit Line and the Crescent Transit Line vessels operating on the Great Lakes, and as such it was necessary for me to check freight in and out of boats, at various times I was in the holds, and had charge of the stevedores.

[83] Q. Were you in the holds both when the vessel was standing still and when it was in motion?

A. Yes.

Q. Is there any difference in the amount of heat in the holds of a vessel if it is standing still or if it is in motion?

A. Yes, especially where there is a ventilator, and all the boats I have ever been in had ventilators of this kind.

Q. What is the difference between when a vessel is standing still and when it is in motion, as to heat?

A. The ventilators are nothing more or less than a big pipe, funnel shaped at the outside, which catch all the air, or as much air as is going, or as much air as they want, or as the watchman believes should be forced into the hold to avoid internal combustion or fires.

Q. Is it necessary for the vessel to be in motion for those ventilators to work?

A. Well, naturally there would be very little draft when the boat was standing still, and a great lot of draft when the boat is going.

(Deposition of Anson J. Mitchell.)

Q. Would the heat in the holds of a vessel be more when she was standing still than when she was going?

A. Very much so.

Q. Would this condition pertain to the "Eureka" if she was lying at Colon, would it be hotter in her holds standing still than if she was in motion?

A. I would have every reason to believe so.

[84] Mr. PLATT.—I move to strike that out unless it be shown that the witness was at Colon at this time of year, and knew the approximate temperatures at that time, and also on the ground that the witness has not shown whether or not the "Eureka" is a ventilated vessel, therefore an expression of opinion of this subject without this prerequisite knowledge is wholly immaterial and incompetent.

Exception.

Mr. WELLES.—Libelant reserves the privilege of connecting up any testimony by statements of other witnesses.

Q. How long were you on vessels this way, as shipping agent?

A. Approximately I think it was four or five years, either four or five years,—I was connected not as agent, as check clerk and then bill clerk.

Q. What were your occupations during this period?

A. First check clerk, then bill clerk, then clerk, then agent, and then traveling agent, then I quit.

Q. Did you have occasion to go on the ocean as well as on the Great Lakes during this time?

A. Yes, I have been on the ocean several times,

(Deposition of Anson J. Mitchell.)

and I have been all over the lakes, six or seven different times.

Q. And in the holds of vessels?

A. And in the holds of vessels.

Mr. PLATT.—I move to strike out all the [85] testimony of the witness with regard to what his experience on the Great Lakes has been, as not qualifying him to express an opinion as to the conditions in tropical waters, or going to and from the Panama Canal, as not making him competent as an expert to express opinions as to the conditions of weather, loading, heat, cargo or otherwise, which objection is considered as made to all of the inquiries above made.

Q. Was your experience on the Great Lakes and on the ocean similar—with vessels similar to the “Eureka”?

A. Well, on the Great Lakes it was practically the same kind of steamers, but on the ocean, of course, it was passenger steamers I was on.

Q. What sort of a vessel is the “Eureka”?

A. I don't know what you would call her.

Q. Freighter or what? A. Freighter, yes.

Q. What is known as a tramp steamer?

A. Considered a tramp steamer.

Q. I mean what is known as the tramp type of steamer? A. Yes, sir.

Adjourned to December 15, 1916, at 10 A. M.

(Deposition of Anson J. Mitchell.)

[86] New York, December 15, 1916, 10 A. M.

Met pursuant to adjournment.

Present as before.

Examination of ANSON J. MITCHELL (Continued).

(By Mr. WELLES.)

Q. Mr. Mitchell, what was the total value of the shipment which left Cleveland August 31, 1915, consisting of 116 barrels?

A. The total value was \$3,390.69.

Q. Was that the value at the time that they were placed on board the "Eureka" at New York?

A. It was.

Q. What was the value of the shipment which left Cleveland under date of September 4, 1915?

A. One of the cars was \$3,642.75.

Q. What did that shipment consist of?

A. Goods loaded in New York Central car #204,849 on September 4th, consisting of 124 barrels and one box, valued at \$3,642.75 when loaded on the steamer at Philadelphia.

Q. As to the third shipment?

A. A shipment which left Cleveland on September 4th on C. R. R. of N. J. car #30,796, consisting of 123 barrels and 12 boxes of cells, and was [87] valued at \$3,619.70 when loaded on the steamer at Philadelphia.

Q. What was the total value of all three shipments at the time they were loaded on board the "Eureka"?

A. \$10,653.14.

(Deposition of Anson J. Mitchell.)

Q. What price did you receive for these goods when resold?

Mr. PLATT.—Objected to on the ground that the same is incompetent, irrelevant and immaterial, because under the testimony as heretofore introduced in evidence by this witness, the deterioration in the value of the subject of the shipment by the libelant upon the steamship “Eureka” was due to causes specifically excepted in the bill of lading under which the goods were shipped, to wit: deterioration arising from heat and confinement in the hold of the vessel, both in and of themselves, and as connected with the prolongation of the voyage, which was likewise within the exceptions of the terms of the bill of lading, and due likewise to the deterioration in value or deterioration in quality, or both, due to the inherent character of the commodity under carriage, from any liability for which the carrier was expressly excepted by Clauses 1, 2, 3 and 8 of the bill of lading, Libelant’s Exhibits 1, 3 and 5, the benefit of [88] each and all of which provisions is expressly claimed by the vessel and the claimant, as well as all other provisions of the bill of lading, whether specifically enumerated or not, and for each and all of these reasons the question and the answer thereto are each incompetent, irrelevant and immaterial; which objection the claimant at this time makes to each and all of the inquiries relating to damage to the cargo, deterioration in quality, depreciation in value, or any other shrinkage or loss in market value of every kind and nature, without renewing

(Deposition of Anson J. Mitchell.)

this objection to each and every succeeding inquiry of the same character, and in addition thereto, the carrier and the claimant places the same objection in the record as a motion to strike out as incompetent, irrelevant and immaterial each and every answer relating to proof of damage on the same grounds and for the same reasons, where the form of the question does not indicate in advance that the question of damage is the question under consideration, and makes this motion as a continuing motion to each and all answers relating to the question of damage, without the necessity of renewing the said motion to each and all answers wherein the subject matter of the [89] answer is in whole or in part the question of damage, depreciation, deterioration, shrinkage or loss of market or other value.

Mr. WELLES.—Excepted to as incompetent, irrelevant and immaterial, and consisting of conclusions of law and conclusions of fact not warranted by the evidence.

A. A total net price of \$7,831.01.

Q. What was the difference in price—the difference in the value and the resale price?

Same objection and motion. Same exception.

A. \$2,822.13.

Q. What was this difference due to?

Same objection and motion. Same exception.

A. To the damage accruing on account of the goods being delayed and not having been turned over to us at Colon upon our first demand.

Mr. PLATT.—Claimant moves to strike out the

(Deposition of Anson J. Mitchell.)¹

foregoing answer, in addition to the continuing motion, on the additional ground that the same is incompetent, irrelevant and immaterial for the reason that there was no obligation resting upon the carrier, under the terms of the bill of lading, to deliver part cargo to an individual consignor, such as the libelant, at Colon or at any other point [90] selected by the consignor, and that, as disclosed by the evidence, the delivery of the shipment at New Orleans was accepted by the libelant without any objection as to time or place, and whether or not it was so accepted, it was, under the terms of the bill of lading, a legal delivery in accordance with the terms and conditions of the bill of lading, Libelant's Exhibits 1, 3 and 5.

Same exception.

Q. What freight charges did you pay from New Orleans to Jersey City on these three shipments?

Same continuing motion and objection.

Same exception.

A. \$401.43.

Q. What expenses did you pay at New Orleans?

Same continuing objection and motion.

Same exception.

A. \$261.81.

Q. What did those charges consist of, briefly, at New Orleans?

A. My expenses down there and while at the hotel, and also the charges, the money that we gave the men there for assisting in unpacking and repacking and recoopering the barrels, and incidental expenses.

(Deposition of Anson J. Mitchell.)'

Mr. PLATT.—I move to strike out the testimony with reference to the question of expenses [91] of the witness as not specifying any amount, and on the ground that the same would not be recoverable as an element of damage in a case of this character, and is incompetent, irrelevant and immaterial for this reason.

Same exception.

Q. What did you pay for labor and material to put the cells in shape for shipment to Jersey City?

Same continuing objection and motion.

Same exception.

A. \$414.40.

Q. Did you pay anything for incidental expenses prior to turning the goods over?

Same objection, motion and exception.

A. \$137.81.

Q. Please state in detail what these incidental expenses consisted of?

A. Telephone calls for account of the S. S. "Eureka" as follows:

10/14/15 to Philadelphia.....	\$6.35
10/16/15 " "	9.95
10/19/15 " "	4.55
11/1/15 " "	2.75
11/8/15 " "	2.75
11/11/15 " "	2.75

Amounting to

29.10

(Deposition of Anson J. Mitchell.)

Telegrams for account of S. S. "Eureka", as follows:

10/1/15 Rubelli Sons, Phila.....	.40
10/25/15 Oregon-Cal. Shipping Co., Portland, Ore.	3.19

[92]

10/27/15 Oregon-Cal. Shipping Co., Portland, Ore.	1.69
11/3/15 Rubelli Sons, Phila.....	.60
11/3/15 Oregon-Cal. Shipping Co.....	1.21
11/4/15 " " "	1.50
11/5/15 " " "	1.69
11/11/15 Kurz, Chicago.....	.35
11/11/15 Dwyer " .....	.53

Amounting to 11.16

Trips to Philadelphia:

10/9/15 Trip to Philadelphia.....	54.25
10/22/15 " " "	43.30

Amounting to\$97.55

And making a total in all of..... \$137.81

Mr. PLATT.—In addition to the foregoing motion, the claimant moves to strike out the said testimony as incompetent, irrelevant and immaterial on the ground that the character of the expenditures therein set forth are not such as are a proper element of damage in connection with the alleged depreciation and deterioration in the subject matter of the shipment.

Exception.

(Deposition of Anson J. Mitchell.)

Q. What was the total of the charges above stated by you?

Same objection, motion and exception.

A. \$1,215.45.

Q. What does this amount to, if added to the difference between the price at which the goods were resold and the original value at the point of shipment?

[93] Same objection, motion and exception.

A. \$4,037.58.

Q. Does that include the total of your damages?

Same objection, motion and exception.

A. No, it does not include a drop or change in price of two cents per cell which we would have received had the goods been delivered on schedule time at destination; neither does it include insurance charges, nor additional freight covering the barrels of batteries which we were compelled to ship to the same destination on account of these not being delivered as originally consigned.

Mr. PLATT.—In addition to the continuing motion to strike out, claimant moves to strike out all of that portion of the witness' testimony as incompetent, irrelevant and immaterial, which relates to the prospective profits which the libellant might have made, provided the goods had been carried through the Panama Canal to the points of original delivery named in the bill of lading, on the ground that the prospective profits are not proper elements of damage, and I move to strike out that portion of the answer of the witness which relates to additional

(Deposition of Anson J. Mitchell.)
 freight charges or transportation charges on substituted material subsequently claimed to have been forwarded to the same points [94] of destination as the shipments covered by Libelant's Exhibits 1, 3 and 5, on the ground that the same are not proper elements of damage.

Exception.

Q. Will you please state in detail the cells from this shipment that were shipped from your Jersey City plant and resold and the prices that were realized for them, and the dates on which they were shipped?

Same objection, motion and exception.

They are as follows:

				Amt. of Invoice.
1916.				
Jan. 11—	BJ-31323—	125 2½x6	IGNITORS—SCREW	23.57
	BJ-31342—	125 2½x6	“ “	24.38
	BJ-31347—	125 2½x6	“ “	28.75
	BJ-31356—	125 2½x6	“ “	28.75
	BJ-31359—	125 2½x6	“ “	24.38
	BJ-31368—	125 2-x6	REGULARS—SCREW	23.75
	BJ-31369—	125 2½x6	IGNITORS—SCREW	24.38
	BJ-31376—	125 2½x6	“ “	28.75
	BJ-38087—	125 2½x6	“ “	28.75
Jan. 12—	BJ-31330—	125 2½x6	GLOBE—SCREW	21.88
	BJ-31334—	125 2½x6	REGULARS—SCREW	27.85
	BJ-31349—	125 2½x6	IGNITORS—SCREW	23.16
	BJ-31361—	125 2½x6	“ “	24.38
	BJ-31363—	125 2½x6	“ “	28.75
	BJ-31380—	125 2½x6	“ “	28.75
	BJ-31390—	125 2½x6	“ “	23.16
	BJ-31400—	125 2½x6	“ “	23.16
	BJ-31406—	250 2½x6	REGULARS—SCREW	47.50
	BJ-31424—	125 2½x6	IGNITORS—SCREW	28.75
	BJ-31432—	125 2½x6	“ “	24.38
	BJ-31441—	125 2½x6	“ “	24.38
	BJ-37701—	125 2½x6	“ “	23.16
	BJ-37702—	125 2½x6	“ “	23.16
	BJ-38078—	125 2½x6	“ “	28.75

[95]						Amt. of
1916.						Invoice.
Jan. 13—	BJ-31394—	125	2½x6	IGNITORS—SCREW	.....	28.75
	BJ-31412—	125	2½x6	“	“	28.75
	BJ-31415—	125	2½x6	“	“	24.38
	BJ-31422—	125	2½x6	“	“	23.16
	BJ-31426—	125	2½x6	“	“	23.16
	BJ-31433—	125	2½x6	“	“	24.38
	BJ-31443—	125	2½x6	“	“	28.75
	BJ-31445—	125	2½x6	“	“	28.75
	BJ-31449—	125	2½x6	“	“	24.38
	BJ-31464—	125	2½x6	“	“	24.38
	BJ-31475—	125	2½x6	“	“	28.75
	BJ-31478—	125	2½x6	“	“	24.38
	BJ-31489—	125	2½x6	“	“	23.16
	BJ-31499—	125	2½x6	“	“	24.17
	BJ-31500—	125	2½x6	“	“	23.78
	BJ-37521—	125	2½x6	“	“	23.16
	BJ-37522—	125	2½x6	“	“	23.16
	BJ-37704—	500	2½x6	REGULARS—SCREW	.....	90.25
	BJ-38077—	125	2½x6	ATLANTICS—SCREW	.....	23.13
	BJ-38105—	125	2½x6	IGNITORS—SCREW	.....	23.16
	BJ-38109—	125	2½x6	“	“	28.75
	BJ-38118—	125	2½x6	“	“	24.38
	BJ-38131—	125	2½x6	“	“	28.75
Jan. 14—	BJ-31467—	125	2½x6	IGNITORS—SCREW	.....	24.38
	BJ-31476—	125	2½x6	“	“	28.75
	BJ-31477—	125	2½x6	“	“	24.38
	BJ-31507—	125	2½x6	“	“	23.16
	BJ-31509—	125	2½x6	“	“	24.38
	BJ-31515—	125	2½x6	“	“	23.16
	BJ-31521—	125	2½x6	REGULARS—SCREW	.....	22.56
	BJ-31522—	125	2½x6	“	“	22.56
	BJ-31523—	750	2½x6	“	“	135.38
	BJ-31524—	125	2½x6	“	“	22.56
	BJ-31525—	125	2½x6	“	“	22.56
	BJ-31536—	125	2½x6	IGNITORS—SCREW	.....	24.38
	BJ-31541—	1250	2½x6	“	“	287.50
	BJ-37711—	625	2½x6	REGULARS—SCREW	.....	118.75
	BJ-38112—	125	2½x6	IGNITORS—SCREW	.....	28.75
	BJ-38113—	125	2½x6	“	“	28.75

						Amt. of Invoice.
[96]						
1916.						
Jan. 15—	BJ-31528—	125	2½x6	IGNITORS—SCREW	.....	23.16
	BJ-31529—	125	2½x6	“	“	23.16
	BJ-31535—	125	2½x6	“	“	24.38
	BJ-31538—	125	2½x6	“	“	24.38
	BJ-31539—	125	2½x6	“	“	23.81
	BJ-31566—	125	2½x6	“	“	24.38
	BJ-31571—	125	2½x6	“	“	24.38
	BJ-31585—	2500	2½x6	“	“	487.50
	BJ-31608—	125	2½x6	“	“	23.16
	BJ-37703—	125	2½x6	“	“	23.16
	BJ-37726—	125	2½x6	“	“	23.16
Jan. 17—	BJ-31462—	125	2½x6	REGULARS—SCREW	.....	23.75
	BJ-31514—	125	2½x6	ATLANTIC—SCREW	.....	20.63
	BJ-31626—	125	2½x6	IGNITORS—SCREW	.....	24.38
	BJ-31639—	125	2½x6	“	“	24.38
	BJ-38074—	125	2½x6	“	“	25.54
Jan. 18—	BJ-31657—	125	2½x6	IGNITORS—SCREW	.....	24.38
	BJ-31670—	500	2½x6	REGULARS—SCREW	.....	99.75
Jan. 19—	BJ-38208—	125	2½x6	IGNITORS—SCREW	.....	31.88
Jan. 20—	BJ-31760—	125	2½x6	REGULARS—SCREW	.....	26.25
	BJ-31764—	125	2½x6	“	FAHN.	26.25
	BJ-31772—	125	2½x6	“	“	23.57
	BJ-31788—	125	2½x6	“	SCREW	24.94
	BJ-31805—	125	2½x6	“	“	24.94
	BJ-37722—	125	2½x6	“	“	22.56
	BJ-38194—	125	2½x6	CONNECTICUT—SCREW	.....	27.01
	BJ-38249—	125	2½x6	REGULARS—SCREW	.....	27.50
Jan. 21—	BJ-31828—	125	2½x6	REGULARS—SCREW	.....	30.00
	BJ-31855—	1250	2½x6	“	FAHN.	300.00
	BJ-38227—	375	2½x6	“	SCREW	82.50
Jan. 25—	BJ-31926—	125	2½x6	REGULARS—SQ. C. SCREW	.....	26.25
	BJ-31978—	125	2½x6	“	SCREW	26.25
	BJ-32001—	125	2½x6	“	“	30.00
Jan. 27—	BJ-31972—	8	0-4	COLUMBIA CELLS	.....	1.36
	BJ-32011—	125	2½x6	REGULARS—SCREW	.....	24.94
	BJ-32061—	250	2½x6	“	“	52.50
	BJ-32089—	250	2½x6	“	“	52.50
	BJ-32094—	125	2½x6	“	FAHN.	24.94

[97]				Amt. of Invoice.	
1916.					
Jan.	28	BJ-31964— 250	2½x6	ATLANTICS—SCREW	46.25
		BJ-32077— 125	2½x6	REGULARS—SCREW	26.25
		BJ-32085— 125	2½x6	“ “	30.00
		BJ-32111— 125	2½x6	IGNITORS—SCREW	25.54
		BJ-32114— 125	2½x6	REGULARS—SCREW	27.50
		BJ-32116— 125	2½x6	“ “	22.56
		BJ-38378— 125	2½x6	“ FAHN.	24.94
		BJ-38400— 125	2½x6	“ SCREW.	30.00
Jan.	29	BJ-32080— 125		EASTERN—SCREW	30.00
		BJ-32106— 125		REGULARS—SCREW	26.25
		BJ-32217— 125		“ “	24.94
		BJ-32221— 125		IGNITORS—SCREW	26.88
		BJ-38330— 125		REGULARS—SCREW	24.94
		BJ-38401— 125		“ “	30.00
		BJ-32090— 625		ROYAL BLUE CELLS.....	118.75
Jan.	31	BJ-32048— 125		IGNITORS—SCREW	26.88
		BJ-32124— 125		REGULARS—SCREW	30.00
		BJ-32134— 125		RED LABEL REGS. SCREW..	24.94
		BJ-32189— 125		IGNITORS—SCREW	24.88
		BJ-32248— 125		REGULARS—SCREW	29.93
		BJ-32254— 125		IGNITORS—SCREW	26.88
		BJ-32266— 125		“ “	26.88
		BJ-38391— 125		ATLANTICS—SCREW	23.13
		BJ-38460— 625		REGULARS—SCREW	131.25
		BJ-38461— 125		IGNITORS—SCREW	26.88
		BJ-32279— 125		REGULARS—SCREW	26.25
Feb.	1	BJ-32249— 125		REGULARS—SCREW	24.94
		BJ-38441— 125		GLOBE CELLS—SCREW	25.63
Feb.	2	BJ-32206— 800		REGULARS—SCREW	168.00
		BJ-32282— 375		ATLANTICS—SCREW	69.38
		BJ-32290—1000		REGULARS “	210.00
		BJ-32303—1000		EXETER CELLS SCREW.....	185.00
		BJ-32350— 125		REGULARS—SCREW	26.25
		BJ-32361— 125		“ “	25.54
		BJ-38485— 125		“ “	30.00
		BJ-38538— 125		“ “	27.50
Feb.	3	BJ-38575— 125		REGULARS—SCREW	30.00
Feb.	4	BJ-32401— 125		REGULARS—SCREW	26.25
Feb.	5	BJ-32439— 250		REGULARS—SCREW	49.87
		BJ-38622— 125		“ “	26.25

				Amt. of Invoice.
[98]				
1916.				
Feb.	7—BJ-32268— 250	REGULARS—SCREW		60.00
	BJ-32523— 125	“ “		26.25
Feb.	8—BJ-32408— 125	EASTERN CELLS—SCREW...		30.00
	BJ-32499— 125	REGULARS—SCREW		30.00
	BJ-32526— 125	“ “		24.94
	BJ-32527— 125	“ “		24.94
	BJ-32528— 125	“ “		24.94
	BJ-32529— 125	“ “		24.94
	BJ-32530— 125	“ “		24.94
	BJ-32531— 125	“ “		24.94
	BJ-32532— 125	“ “		24.94
	BJ-32533— 125	“ “		24.94
	BJ-32534— 125	“ “		24.94
	BJ-32535— 125	“ “		24.94
	BJ-32542— 250	“ “		49.87
Feb.	9—BJ-32495— 125	2½x6 REGULARS T. W. CO.		
		CELLS—SCREW		
		(Atl. Gr.).....		26.25
	BJ-32585— 125	2½x6 REGULARS—SCREW		26.25
	BJ-32643— 125	2½x6 “ “		24.94
	BJ-32644— 125	2½x6 “ “		24.94
	BJ-32645— 125	2½x6 “ “		24.94
	BJ-32646— 125	2½x6 “ “		24.94
	BJ-32647— 125	2½x6 “ “		24.94
	BJ-32648— 125	2½x6 “ “		24.94
	BJ-32649— 125	2½x6 “ “		24.94
Feb.	10—BJ-32657— 125	2½x6 REGULARS—SCREW		30.00
Feb.	11—BJ-32664— 125	RED LABEL COL. SCREW...		30.00
Feb.	14—BJ-38694— 125	RED LABEL “ “		26.25
Feb.	16—BJ-32914— 125	REGULARS—SCREW		24.94
	BJ-32923— 125	“ “		24.94
	BJ-38605— 125	CONNECTICUT CELLS—		
		SCREW.....		30.00
	BJ-38718— 125	REGULARS—SCREW		30.00
Feb.	17—BJ-32792— 125	REGULARS—SCREW		30.00
	BJ-32794— 125	“ “		30.00
	BJ-32810— 125	“ “		26.25
	BJ-38715— 125	“ “		30.00

[99—100] 1916.		Amount of Invoice.
Feb. 18—BJ-46270—125	REGULARS—SCREW	30.00
Feb. 19—BJ-32851—125	REGULARS—SCREW	24.94
BJ-32913—500	" "	99.75
BJ-32915—125	" "	24.94
BJ-32916—750	" "	149.62
BJ-32948—125	ATLANTICS "	23.93
BJ-33062—125	REGULARS "	26.25
BJ-46243—250	" "	60.00
BJ-46299—125	" "	26.25
Feb. 21—BJ-32984—250	REGULARS—SCREW	55.37
BJ-32985—125	" "	27.68
BJ-33097—125	" "	24.94
Feb. 24—BJ-33191—125	REGULARS—SCREW	26.25
BJ-33282—125	" "	26.25
Feb. 25—BJ-33092—125	"B. F. J." CELLS—ATL. GR. SCREW	24.38
BJ-33132—125	REGULARS—SCREW	30.00
BJ-46290—125	REGULARS—SCREW	24.94
Feb. 26—BJ-33024—300	EXETER CELLS, ATL. GR. SCREW	55.50
Feb. 28—BJ-33276—125	RED LABEL COL. CELLS SCREW.	26.25
BJ-33393—250	" " " " " " ..	49.87
BJ-33451—125	REGULARS—SCREW	26.25
Mar. 6—BJ-33734—125	RED LABELS REGULARS—SCREW	30.00
Mar. 14—BJ-34152—125	REGULARS—SCREW	30.00
Mar. 24—BJ-39100—375	REGULARS, SCREW	74.81
Mar. 25—BJ-37922—500	REGULARS, SCREW	99.75
BJ-37977—250	" "	55.37
BJ-39018—125	" "	26.25
BJ-37978—125	" "	27.68
Mar. 27—BJ-39127—125	ATLANTICS—SCREW	23.13
		<hr/> \$8,052.03
	Value of goods returned.....	\$70.62
	Credits allowed acct. complaints from customers re bad cells	221.02
		<hr/> \$7,831.01

(Deposition of Anson J. Mitchell.)

[101] Q. Were these the same batteries that were shipped from your Cleveland plant?

Same continuing objection and motion.

Same exception.

A. They were.

Deposition of Francis G. Coxon, for Libelant.

[102] FRANCIS G. COXON, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

(By Mr. WELLES.)

Q. Captain, what is your business?

A. I am marine surveyor.

Q. Have you ever had any experience on the sea?

A. Oh, yes, since 1876 until 1907.

Q. State briefly what your experience has been?

A. Apprenticeship four years and officer and master from 1881, officer and master of British ships until 1907, at which time I was Marine Surveyor in the port of New York, and since 1904 Marine Surveyor in the port of New York.

Q. What experience have you had on steamers of the tramp type and steam schooner type?

A. Steam schooners, I have had experience on more or less during that time, in tramp and passenger steamers, cargo and passenger steamers.

Q. Has your experience been both on wooden and steel vessels?

A. Iron and steel vessels only, no wooden vessels; I have never been on a wooden vessel; sailing ships and steamers.

(Deposition of Francis G. Coxon.)

Q. What experience have you had with vessels in the tropics?

A. For 28 years I have been in the Brazil trade, connected with ships in the north Brazil trade.

Q. Where did you sail to from Brazil?

A. Mostly from [103] northern ports, the Amazon, down as far as Pernambuco.

Q. Sailed from the United States, and to and from the United States? A. Yes.

Q. Made regular trips from the United States to Brazilian ports? A. Yes, regular trips.

Q. Are you familiar with conditions in the holds of vessels making such trips? A. Yes.

Q. In cargo vessels? A. Yes.

Q. Assuming that a steel screw steamer of in the neighborhood of 2122 tons, left Philadelphia about September 16th, 1915, and arrived at Colon in the Panama Canal Zone about September 29th, 1915, a period of approximately 13 days, and that she stayed at Colon till about November 5th, a period of approximately 37 days, would the heat conditions in her hold be higher than if she had sailed through the Panama Canal and arrived at California ports about 21 days from leaving Philadelphia?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, as the witness has not shown that he ever visited the port of Colon or the Panama Canal or the waters immediately adjacent to either the east or west coast of Panama.

Exception.

A. I should say that the vessel being at anchor or

(Deposition of Francis G. Coxon.)

lying still in the port, the ventilation in the holds [104] would not be the same as if she was proceeding.

Q. What would the conditions as to heat in the holds be?

Mr. PLATT.—Same objection as to the last preceding question.

Same exception.

A. In hot weather while the vessel is lying still the heat in the holds would naturally be higher than if she was proceeding.

Q. Is the temperature of Colon approximately the same as the temperature at the points to which you have been calling in your experience?

Same objection and exception.

A. I should say practically about the same.

Q. Is the temperature generally the same through these waters in the tropics?

Same objection and exception.

A. It is not the same in all localities, naturally.

Q. Is there any very great difference?

Same objection and exception.

A. Not a great deal, no.

Q. Is it very warm at Colon in the months of September, October and November?

Same objection and exception.

A. Yes, I assume it would be the same.

[105] Q. How does it compare with our summer heat in New York and summer heat at ports such as Portland and San Francisco?

Same objection. Same exception.

(Deposition of Francis G. Coxon.)

A. I would assume at Portland it would be much cooler.

Q. How would it compare with heat at New York?
Same objection. Same exception.

A. It would be warmer, I consider, in those months at Colon than it would be at New York at the same time.

Q. Would it be warmer than our ordinary summer temperature in August?

Same objection. Same exception.

A. No.

Q. Would it be about the same?

A. About the same.

Q. Would the heat in the holds be greater if the vessel had no ventilators than if she had ventilators?

A. Yes.

Q. Would it make any difference to a vessel without ventilators, whether she was standing still or traveling? A. Yes, there would be a difference.

Q. What would the difference be?

A. The difference would be she would be cooler proceeding.

Q. Any vessel would be cooler under way?

A. Better means of cooling the hold.

Q. That would apply to any kind of vessel?

A. Yes, any kind of vessel.

[106] Q. Would it be true that the longer a vessel stayed at the dock, or stayed at rest at a place like Colon the hotter the holds would get?

A. Yes, I would say that the heat would accumulate; it would retain its heat.

Deposition of Edwin J. Wilson, for Libelant.

[107] EDWIN J. WILSON, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

(By Mr. WELLES.)

Q. What is your connection, if any, with the National Carbon Company, the libelant in this action?

A. Manager of the eastern works of the National Carbon Company, the factory being in Jersey City, New Jersey.

Q. Do you recall a shipment of batteries that came to your plant from New Orleans in the early part of December, 1915? A. Yes.

Q. Where did that shipment originate from?

A. From New Orleans.

Q. What was done with that shipment?

Mr. Platt.—Objected to on the ground that it is incompetent, irrelevant and immaterial, because under the testimony heretofore introduced the deterioration in the value of the subject of the shipment by the libelant upon the SS. "Eureka" was due to causes specifically excepted in the bill of lading under which the goods were shipped, to wit, deterioration arising from heat and confinement in the hold of the vessel, both in and of themselves, and as connected with the prolongation of the voyage, which was likewise within the [108] exceptions of the terms of the bill of lading, and due likewise to the deterioration in value or deterioration in quality, or both, due to the inherent character of the commodity under carriage, from any liability for

(Deposition of Edwin J. Wilson.)

which the carrier was expressly excepted by Clauses 1, 2, 3 and 8 of the bill of lading, Libellant's Exhibits 1, 3 and 5, and the benefit of each and all of which provisions is expressly claimed by the vessel and the claimant, as well as all other provisions of the bill of lading, whether specifically enumerated or not, and for each and all of these reasons the question is incompetent, irrelevant and immaterial; which objection the claimant at this time makes to each and all of the inquiries relating to damage to the cargo, deterioration in quality, depreciation in value, or any other shrinkage or loss in market value of every kind and nature, without renewing its objection to each and every succeeding inquiry of the same character, and in addition thereto, the carrier and the claimant places the same objection in the record, as a motion to strike out as incompetent, irrelevant and immaterial each and every answer relating to proof of damage on the same grounds and for the same reasons, where the [109] form of the question does not indicate in advance that the question of damage is the question under consideration, and makes this motion as a continuing motion to each and all answers relating to the question of damage, without the necessity of renewing the said motion to each and every answer wherein the subject matter of the answer is in whole or in part the question of damage, depreciation, deterioration, shrinkage, or loss of market or other value.

Mr. WELLES.—Same exception as heretofore.

A. It was first unloaded from the cars, checked up,

(Deposition of Edwin J. Wilson.)

tested, reconditioned, and shipped out on orders.

Q. Was it shipped out as first-class goods?

Same objection. Same exception.

A. Not altogether.

Q. Was the shipment in good condition when it reached your plant?

Same objection. Same exception.

A. No.

Q. Was its condition such that it was necessary to recondition it?

Same objection, motion and exception.

A. Yes.

Q. Did you see the shipment? A. Yes.

[110] Q. Did you issue orders for reconditioning it?

Same objection, motion and exception.

A. Yes.

Q. Are all batteries marked when they leave your factory with the date and class or grade? A. Yes.

Q. Have you been in the other plants of the company? A. Yes.

Q. Have you been in the Cleveland plant?

A. Yes.

Q. Is that same custom maintained at the Cleveland plant? A. Yes.

Q. Are old batteries as readily salable as ones just put out by the factory? A. No.

Q. Does your plant ever ship for export trade or for shipment to the Pacific coast any but first-class batteries?

Mr. PLATT.—Same continuing motion and objec-

(Deposition of Edwin J. Wilson.)

tion. Objected to further on the ground that it is immaterial what the Jersey City plant does as the Cleveland plant is the plant from which it is claimed that these goods were shipped.

Same exception.

A. No, we do not.

Q. When these goods left your factory were they of a class that was suitable for shipping for export or for California ports?

Same continuing objection and motion and same [111] objection as to the last question.

Same exception.

A. No.

Q. For what reason?

Same objections and motion. Same exception.

A. We did not consider them good enough for shipment to those points, in fact, we made it a point not to ship any, not even to southern points where the climate is warm.

Q. Does it require a specially high grade of batteries for export to California points?

Same objections and motion. Same exception.

A. It does.

Q. Will you please state in detail the batteries that were sent out from your plant, and the dates of such shipments which arrived from New Orleans as you have stated?

Same continuing objection and motion.

Same exception.

A. 1916.

Jan. 11—BJ-31323—	125	2½x6	IGNITORS—SCREW
BJ-31342—	125	2½x6	“ “
BJ-31347—	125	2½x6	“ “
BJ-31356—	125	2½x6	“ “
BJ-31359—	125	2½x6	“ “
BJ-31368—	125	2-x6	REGULARS—SCREW
BJ-31369—	125	2½x6	IGNITORS—SCREW
BJ-31376—	125	2½x6	“ “
BJ-38087—	125	2½x6	“ “
[112]			
Jan. 12—BJ-31330—	125	2½x6	GLOBE—SCREW
BJ-31334—	125	2½x6	REGULARS—SCREW
BJ-31349—	125	2½x6	IGNITORS—SCREW
BJ-31361—	125	2½x6	“ “
BJ-31363—	125	2½x6	“ “
BJ-31380—	125	2½x6	“ “
BJ-31390—	125	2½x6	“ “
BJ-31400—	125	2½x6	“ “
BJ-31406—	250	2½x6	REGULARS—SCREW
BJ-31424—	125	2½x6	IGNITORS—SCREW
BJ-31432—	125	2½x6	“ “
BJ-31441—	125	2½x6	“ “
BJ-37701—	125	2½x6	“ “
BJ-37702—	125	2½x6	“ “
BJ-38078—	125	2½x6	“ “
Jan. 13—BJ-31394—	125	2½x6	IGNITORS—SCREW
BJ-31412—	125	2½x6	“ “
BJ-31415—	125	2½x6	“ “
BJ-31422—	125	2½x6	“ “
BJ-31426—	125	2½x6	“ “
BJ-31433—	125	2½x6	“ “
BJ-31443—	125	2½x6	“ “
BJ-31445—	125	2½x6	“ “
BJ-31449—	125	2½x6	“ “
BJ-31464—	125	2½x6	“ “
BJ-31475—	125	2½x6	“ “
BJ-31478—	125	2½x6	“ “
BJ-31489—	125	2½x6	“ “
BJ-31499—	125	2½x6	“ “
BJ-31500—	125	2½x6	“ “
BJ-37521—	125	2½x6	“ “
BJ-37522—	125	2½x6	“ “
BJ-37704—	500	2½x6	REGULARS—SCREW
BJ-38077—	125	2½x6	ATLANTICS—SCREW
BJ-38105—	125	2½x6	IGNITORS—SCREW
BJ-38109—	125	2½x6	“ “
BJ-38118—	125	2½x6	“ “
BJ-38131—	125	2½x6	“ “

[113]

Jan. 14—	BJ-31467—	125	2½x6	IGNITORS—SCREW
	BJ-31476—	125	2½x6	“ “
	BJ-31477—	125	2½x6	“ “
	BJ-31507—	125	2½x7	“ “
	BJ-31509—	125	2½x6	“ “
	BJ-31515—	125	2½x6	“ “
	BJ-31521—	125	2½x6	REGULARS—SCREW
	BJ-31522—	125	2½x6	“ “
	BJ-31523—	750	2½x6	“ “
	BJ-31524—	125	2½x6	“ “
	BJ-31525—	125	2½x6	“ “
	BJ-31536—	125	2½x6	IGNITORS—SCREW
	BJ-31541—	1250	2½x6	“ “
	BJ-37711—	625	2½x6	REGULARS—SCREW
	BJ-38112—	125	2½x6	IGNITORS—SCREW
	BJ-38113—	125	2½x6	“ “
Jan. 15—	BJ-31528—	125	2½x6	IGNITORS—SCREW
	BJ-31529—	125	2½x6	“ “
	BJ-31535—	125	2½x6	“ “
	BJ-31538—	125	2½x6	“ “
	BJ-31539—	125	2½x6	“ “
	BJ-31566—	125	2½x6	“ “
	BJ-31571—	125	2½x6	“ “
	BJ-31585—	2500	2½x6	“ “
	BJ-31608—	125	2½x6	“ “
	BJ-37703—	125	2½x6	“ “
	BJ-37726—	125	2½x6	“ “
Jan. 17—	BJ-31462—	125	2½x6	REGULARS—SCREW
	BJ-31514—	125	2½x6	ATLANTICS—SCREW
	BJ-31626—	125	2½x6	IGNITORS—SCREW
	BJ-31639—	125	2½x6	“ “
	BJ-38074—	125	2½x6	“ “
Jan. 18—	BJ-31657—	125	2½x6	IGNITORS—SCREW
	BJ-31670—	500	2½x6	REGULARS—SCREW
Jan. 19—	BJ-38208—	125	2½x6	IGNITORS—SCREW

[114]

Jan. 20—	BJ-31760—	125	2½x6	REGULARS—SCREW
	BJ-31764—	125	2½x6	“ FAHN.
	BJ-31772—	125	2½x6	“ “
	BJ-31788—	125	2½x6	“ SCREW
	BJ-31805—	125	2½x6	“ “
	BJ-37722—	125	2½x6	“ “
	BJ-38194—	125	2½x6	CONNECTICUT—SCREW
	BJ-38249—	125	2½x6	REGULARS—SCREW
Jan. 21—	BJ-31828—	125	2½x6	REGULARS—SCREW
	BJ-31855—	1250	2½x6	“ FAHN.
	BJ-38227—	375	2½x6	“ SCREW
Jan. 25—	BJ-31926—	125	2½x6	REGULARS—SQ. C. SCREW
	BJ-31978—	125	2½x6	“ SCREW
	BJ-32001—	125	2½x6	“ “
Jan. 27—	BJ-31972—	8	0-4	COLUMBIA CELLS
	BJ-32011—	125	2½x6	REGULARS—SCREW
	BJ-32061—	250	2½x6	“ “
	BJ-32089—	250	2½x6	“ “
	BJ-32094—	125	2½x6	“ FAHN.
Jan. 28—	BJ-31964—	250	2½x6	ATLANTICS—SCREW
	BJ-32077—	125	2½x6	REGULARS—SCREW
	BJ-32085—	125	2½x6	“ “
	BJ-32111—	125	2½x6	IGNITORS—SCREW
	BJ-32114—	125	2½x6	REGULARS—SCREW
	BJ-32116—	125	2½x6	“ “
	BJ-38378—	125	2½x6	“ FAHN.
	BJ-38400—	125	2½x6	“ SCREW
Jan. 29—	BJ-32080—	125		EASTERN—SCREW
	BJ-32106—	125		REGULARS—SCREW
	BJ-32217—	125		“ “
	BJ-32221—	125		IGNITORS—SCREW
	BJ-38330—	125		REGULARS—SCREW
	BJ-38401—	125		“ “
	BJ-32090—	625		ROYAL BLUE CELLS

[115]

Jan.	31	—BJ-32048—	125	IGNITORS—SCREW
		BJ-32124—	125	REGULARS—SCREW
		BJ-32134—	125	RED LABEL REGS. SCREW
		BJ-32189—	125	IGNITORS—SCREW
		BJ-32248—	125	REGULARS—SCREW
		BJ-32254—	125	IGNITORS—SCREW
		BJ-32266—	125	“ “
		BJ-38391—	125	ATLANTICS—SCREW
		BJ-38460—	625	REGULARS—SCREW
		BJ-38461—	125	IGNITORS—SCREW
		BJ-32279—	125	REGULARS—SCREW
Feb.	1	—BJ-32249—	125	REGULARS—SCREW
		BJ-38441—	125	GLOBE CELLS—SCREW
Feb.	2	—BJ-32206—	800	REGULARS—SCREW
		BJ-32282—	375	ATLANTICS—SCREW
		BJ-32290—	1000	REGULARS “
		BJ-32303—	1000	EXETER CELLS “
		BJ-32350—	125	REGULARS—SCREW
		BJ-32361—	125	“ “
		BJ-38485—	125	“ “
		BJ-38538—	125	“ “
Feb.	3	—BJ-38575—	125	REGULARS—SCREW
Feb.	4	—BJ-32401—	125	REGULARS—SCREW
Feb.	5	—BJ-32439—	250	REGULARS—SCREW
		BJ-38622—	125	“ “
Feb.	7	—BJ-32268—	250	REGULARS—SCREW
		BJ-32523—	125	“ “
Feb.	8	—BJ-32408—	125	EASTERN CELLS—SCREW
		BJ-32499—	125	REGULARS—SCREW
		BJ-32526—	125	“ “
		BJ-32527—	125	“ “
		BJ-32528—	125	“ “
		BJ-32529—	125	“ “

[116]

Feb.	8—	BJ-32530—	125	REGULARS—SCREW
		BJ-32531—	125	“ “
		BJ-32532—	125	“ “
		BJ-32533—	125	“ “
		BJ-32534—	125	“ “
		BJ-32535—	125	“ “
		BJ-32542—	250	“ “
Feb.	9—	BJ-32495—	2½x6	“T. W. CO.” CELLS—SCREW (ATL. GR.)
		BJ-32585—	125	2½x6 REGULARS—SCREW
		BJ-32643—	125	2½x6 “ “
		BJ-32644—	125	2½x6 “ “
		BJ-32645—	125	2½x6 “ “
		BJ-32646—	125	2½x6 “ “
		BJ-32647—	125	2½x6 “ “
		BJ-32648—	125	2½x6 “ “
		BJ-32649—	125	2½x6 “ “
Feb.	10—	BJ-32657—	125	2½x6 REGULARS—SCREW
Feb.	11—	BJ-32664—	125	RED LABEL COL. SCREW
Feb.	14—	BJ-38694—	125	RED LABEL COL. SCREW
Feb.	16—	BJ-32914—	125	REGULARS—SCREW
		BJ-32932—	125	“ “
		BJ-38605—	125	CONNECTICUT CELLS—SCREW
		BJ-38718—	125	REGULARS—SCREW
Feb.	17—	BJ-32792—	125	REGULARS—SCREW
		BJ-32794—	125	“ “
		BJ-32810—	125	“ “
		BJ-38715—	125	“ “

[117]

Feb.	18—	BJ-46270—	125	REGULARS—SCREW
Feb.	19—	BJ-32851—	125	REGULARS—SCREW
		BJ-32913—	500	“ “
		BJ-32915—	125	“ “
		BJ-32916—	750	“ “
		BJ-32948—	125	ATLANTICS “
		BJ-33062—	125	REGULARS “
		BJ-46243—	250	“ “
		BJ-46299—	125	“ “
Feb.	21—	BJ-32984—	250	REGULARS—SCREW
		BJ-32985—	125	“ “
		BJ-33097—	125	“ “
Feb.	24—	BJ-33191—	125	REGULARS—SCREW
		BJ-33282—	125	“ “
Feb.	25—	BJ-33092—	125	“B. F. J.” CELLS—ATL. GR. SCREW
		BJ-33132—	125	REGULARS—SCREW
		BJ-46290—	125	REGULARS—SCREW
Feb.	26—	BJ-33024—	300	EXETER CELLS, ATL. GR. SCREW
Feb.	28—	BJ-33276—	125	RED LABEL COL. CELLS SCREW
		BJ-33393—	250	RED LABEL COL. CELLS SCREW
		BJ-33451—	125	REGULARS—SCREW
Mar.	6—	BJ-33734—	125	RED LABELS REGULARS—SCREW
Mar.	14—	BJ-34152—	125	REGULARS—SCREW

(Deposition of Edwin J. Wilson.)

[118]

Mar. 24—BJ-39100—375 REGULARS—SCREW

Mar. 25—BJ-37922—500 REGULARS—SCREW

BJ-37977—250 “ “

BJ-39018—125 “ “

BJ-37978—125 “ “

Mar. 27—BJ-39127—125 ATLANTICS—SCREW

[119] Cross-examination by Mr. PLATT.

Q. How many years have you been engaged in the manufacture of dry battery cells?

A. About 15 years.

Q. What is the estimated life of your first quality dry battery cells as put out to the trade?

Mr. WELLES.—Libelant objects, as the witness is not qualified as an expert.

A. I do not care to express myself on that.

Q. Is your unwillingness to express yourself on this subject due to lack of knowledge or lack of information?

A. Lack of knowledge or lack of information, that is the same thing.

Q. Lack of information or lack of technical knowledge? A. Sales information.

Deposition of William A. Richey, for Libelant.

[120] WILLIAM A. RICHEY, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

(By Mr. WELLES.)

Q. What is your connection with the National Carbon Company, if any?

A. Chemist in the eastern works of the National Carbon Company.

(Deposition of William A. Richey.)

Q. Where are those works located?

A. 14th and Henderson Streets, Jersey City, New Jersey.

Q. Is that the same plant that Mr. Wilson has charge of? A. It is.

Q. How long have you been connected with the National Carbon Company?

A. Four years the first day of last August.

Q. Are you conversant with the manufacture and construction of electric dry cells and their testing?

A. I am.

Q. Have you been doing that sort of work over there during the time you have been with them?

A. I have.

Q. Do you recall a shipment of dry cells which arrived from New Orleans in the early part of December, 1915? A. I do.

Q. Can you tell us when those arrived at the plant in Jersey City?

A. They arrived on December 6, 1915.

Q. What did that shipment consist of?

A. According to the report I had on it from our stockroom it consisted of 348 barrels and 12 boxes.

[121] Q. Did your own examination agree with that report?

A. It did; we found the report the same as the stockroom.

Q. You found all those barrels in the stockroom when you examined them? A. Yes, sir.

Q. Can you tell what railroad cars those shipments arrived in? A. I cannot.

(Deposition of William A. Richey.)

Q. Did you examine this shipment in detail?

A. I examined the shipment barrel for barrel and opened each box and made a careful examination of all of them.

Q. Did you test and grade the cells?

Mr. PLATT.—I make the same objection as heretofore stated to Mr. Mitchell's and Mr. Wilson's testimony (pp. 87 and 107).

Same exception.

A. Yes, these cells were tested and graded under my supervision.

Q. You attended to the work personally, did you?

A. Yes, sir.

Q. How were these packages of cells made up?

A. These cells were packed in the standard sugar barrel, we call it.

Q. Describe their condition as you opened the barrels?

A. A layer of straw under the cover of perhaps 3 inches thick, then came one layer of batteries; around this layer of batteries the straw was packed in solider and beneath the [122] top layer was another layer of straw, and then there was a second layer of batteries. This was also packed around the outside as in the first case. Then beneath the second layer was another layer of straw and then a third layer of batteries, and so on. You might say that the three layers constituted the barrel and beneath the bottom layer was another layer of straw.

Q. How thick was the layer of straw in the bottom? A. About three inches, I should say.

(Deposition of William A. Richey.)

Q. Was there a head on the barrel, a closed barrel with a head on it?

A. Yes, the barrel had a head.

Q. How were the boxes packed?

A. The boxes were packed in boxes approximately 2 feet by 18 inches by one foot, or approximately that, I would not say exactly; these were packed in excelsior in two layers.

Q. With excelsior all around the batteries?

A. Around the two layers of batteries.

Q. The batteries all stood on end? A. Yes, sir.

Q. Both in the boxes and in the barrels?

A. Yes, sir.

Q. What was the condition of the boxes and barrels when you found them, any damage?

Same objection and motion. Same exception.

A. As to external conditions we found 24 of the barrel heads broken in. The boxes were in first-class condition.

Q. When you opened the packages what did you find as to general conditions inside? Any signs of damage?

[123] Same objection and motion. Same exception.

A. We found on removing the cells that the greater part of the cells showed straw marks, that is, marks as to the impression made by the straw on the seals, which is only caused by the seal softening under the influence of heat.

Q. Did you find any defects in the jackets?

Same objection and motion. Same exception.

(Deposition of William A. Richey.)

A. The jackets in a great many cases—I should say one per cent of the cells, showed the jackets were wet or moist, due to leakage of the cells. This leakage you might say is produced when the cell is subjected to heat, causing the solution, under the pressure of expansion, due to heat—causing it to force out of the battery. We found the jackets were wet, due to this rather than to external wetness.

Q. Did you find any bulged seals.

Same objection and motion. Same exception.

A. We found about one per cent. This was only produced under extreme active cell conditions, that is, where the cell is subjected to an active internal action, the chemicals act more violently under the influence of heat, causing expansion of the solution in the cells and also causing generation of gas in the cells and the expansion of these will produce a bulging of the seal. The bulging is also made greater by the softening of the seal.

[124] Can you tell whether this was due to heat or what it was due to?

Same objection and motion. Same exception.

A. Any bulging I have ever seen in my experience in examination of cells has been caused from heat, either external heat or heat due to the action of chemicals in the cells.

Q. Could you judge in this case whether it was external heat or heat due to the chemicals?

Same objection and motion. Same exception.

A. It is my opinion that the bulging in this case was due to the greater action of the chemicals in the

(Deposition of William A. Richey.)

cell, caused by the excessive external heat.

Q. Did you see any other signs of excessive external heat on these batteries?

Same objection and motion. Same exception.

A. I cannot think of anything just now.

Q. Did you find any corroded caps?

Same objection and motion. Same exception.

A. We found about one-half of one per cent where the brass caps showed corrosion. This corrosion you might say was caused from the action solution of the cell being forced out in the heating or expansion, and reacting directly upon the cap, causing corrosion.

Q. Were any of the cells out of shape in any way?

[125] Same objection and motion. Same exception.

A. Some of the cells found in one barrel were out of their circular shape, and had assumed an oval shape.

Q. Crushed or how?

Same objection and motion. Same exception.

A. As near as I could tell it was caused by pressure on the can when the seal was soft.

Q. Did you make an internal examination of these cells?

Same objection and motion. Same exception.

A. A portion of these cells, a representative portion, was opened, and an examination made internally to see the condition of the cells.

Q. Was there any sign of any foreign material in the cells?

(Deposition of William A. Richey.)

Same objection and motion. Same exception.

A. We found no trace of any foreign material that would cause the cells to depreciate on the shelf.

Q. Did the cells appear to have been properly made and put together in the first place from what you found?

Same objection and motion. Same exception.

A. I found the cells were made, as near as I could judge, according to the standard cell, and were apparently in first-class condition when they were shipped.

Q. Could you tell where these cells had originally come from?

A. I found the markings on the packing slips, and also the marking on the jackets of the batteries [126] indicated that the cells were originally shipped from our Cleveland factory.

Q. Could you tell from those whether the cells were first-class cells when they were shipped?

Same objection and motion. Same exception.

A. Everything indicated that these cells were first-class cells when they left the factory.

Q. It is the custom in all of your plants, is it not, to mark the grade of cell on the jacket?

Same objection and motion. Same exception.

A. It is.

Q. Did all of these cells that you saw show marks of that?

Same objection and motion. Same exception.

A. All these cells had a mark which was characteristic of that grade of cells.

(Deposition of William A. Richey.)

Q. Did you find any signs of deterioration in the inside of the cells when you opened them?

Same objection and motion. Same exception.

A. I found on the internal examination that the cells showed a depreciation. This was caused by the presence of a corrosion product, which we take as a sign that the cell has a marked depreciation due to excessive internal action.

Q. Could you judge in this case what was the cause [127] of the excessive internal action?

Same objection and motion. Same exception.

A. My opinion of the matter is that the action was caused by a long period of exposure to rather excessive heat. That is what the indications showed on the examination of the cells.

Q. Did you make an electrical test of these cells for electrical strength?

Same objection, motion and exception.

A. These cells were tested for electrical strength by a reading of the voltage and current, you might say, with a standard Western meter.

Q. Did they test up as first-class cells?

Same objection and motion. Same exception.

A. They did not test as first-class cells. There were a great many that read under what we would consider the reading of a first-class battery.

Q. Could these cells have been sold as first-class cells?

Same objection and motion. Same exception.

A. In order to sell these cells it was necessary, that is, in order to dispose of them it was necessary to do

(Deposition of William A. Richey.)

a great deal of work in repairing them, necessary to do a great deal of work on any of them before they could be considered at all marketable, but these cells were graded [128] into three classes. We found that in the first class were cells which were badly straw marked, and these would have to be treated, or what we call retorched, that is, the seal would have to be heated so that it made a smooth finish.

Q. What proportion of these cells required this reconditioning?

Same objection and motion. Same exception.

A. All the cells that were returned required reconditioning.

Q. What did that reconditioning consist of, briefly?

Same objection, motion and exception.

A. The reconditioning consisted in removing the jackets and retorching or redressing the seal and putting on new jackets.

Q. Did you have to refill or repack some of them?

Same objection and motion. Same exception.

A. No, the active materials of the cells themselves were not changed.

Q. How many of these cells showed deterioration of current?

Same objection and motion. Same exception.

A. These cells were examined and read for current. Those reading above the minimum that we accept were about 50%.

Q. About 50% had depreciated enough to take them out of the class of first-class cells? A. Yes.

(Deposition of William A. Richey.)

[129] (By Mr. PLATT.)

Q. The other 50% were all right as far as current is concerned? A. Yes.

(By Mr. WELLES.)

Q. What proportion of these cells had to be reduced to a lower class than first-class cells?

Same objection, motion and exception.

A. 50%.

Q. Would these batteries show a further deterioration subsequent to the date of your test, if they were tested a few weeks later?

Same objection, motion and exception.

A. The condition that the batteries were in when I tested them was such that there might be a further depreciation in say four weeks' time.

Q. Could you judge, from the appearance of the batteries as you saw them whether they had been subjected to a mild heat or a strong heat?

Same objection, motion and exception.

A. My opinion is that the batteries were subjected to about, I should say, 125 degrees Fahrenheit temperature.

Q. Could you judge how long they had been subjected to that temperature?

Same objection, motion and exception.

A. No, that was impossible to judge from the condition. [130] However, I might say that their condition was such as to indicate that the excessive action had continued for a length of time. I would not say just as to the number of days or weeks.

Q. You have examined shipments of cells that

(Deposition of William A. Richey.)

have come through the tropics and through locations similar to the canal zone, have you not?

A. I have seen cells that have been through the tropics.

Q. Did such cells under ordinary conditions of carriage show signs of deterioration by heat?

Same objection, motion and exception.

A. They did not. We make our cells to stand the ordinary conditions of transportation through the tropics. The seal is made at a melting point high enough so that it will stand tropical temperatures, or wherever we ship that particular cell.

Q. When a cell is subjected to heat, is the rate of deterioration any greater as the time it is exposed increases, or does it deteriorate at an even rate per day during the time it is exposed to heat?

Same objection, motion and exception.

A. During the first few days that a battery is exposed to heat there is an increased chemical action, but this action is accelerated as the time goes on, that is, if a battery was exposed to heat say a week the chemical action would no doubt be increased, but the action would be accelerated [131] in an equal period of time after that.

Q. Could you tell whether these batteries had ever been connected up or used at all?

Same objection, motion and exception.

A. There was nothing to indicate that the batteries had been connected up or had been used.

Q. If there had been, would you have noticed any external changes in the ones you examined inter-

(Deposition of William A. Richey.)

nally? A. I would, yes.

Q. They would show any use at all, would they?
Same objection, motion and exception.

A. They would show use.

Q. Could you conclude as to whether or not they had been used?

Same objection, motion and exception.

A. I would say that these batteries had not been used.

Q. Are you familiar with the packing slips that are used in the Cleveland factory?

A. I have seen those slips.

Q. Have you been in the Cleveland factory?

A. I have.

Q. Have you seen the slips there? A. I have.

Q. Are you familiar with the conditions in the Cleveland factory?

A. I have visited the Cleveland factory twice.

Q. Were these packing slips that were in these barrels the same as usually used in the Cleveland factory, at this [132] time? A. They were.

Q. Did they have on them the date of the shipment?

A. They did have on them the date of the shipment.

Q. Could you tell from them whether it was a fresh shipment?

A. As far as the packing slips go it would indicate that the batteries were a fresh shipment.

Q. Were there any entries of depreciation or deterioration on the packing slips?

(Deposition of William A. Richey.)

A. Nothing to indicate anything that would show the cells to be not up to the standard.

Q. For cells that are destined for export work, do you use any special quality?

Mr. PLATT.—Same continuing objection and motion, and on the further ground that it is incompetent as being too general, not being limited to the territory through which this shipment was to pass.

Exception.

A. We do; we use a special cell for the export trade.

Q. Do you use a special class of cell for shipment to California points by way of the Panama Canal?

Mr. PLATT.—Continuing objection and motion, and in addition thereto that it is immaterial as to what may be done in other cases, as what is done in other cases cannot bind the parties to [133] this action as to what was done in this case.

Exception.

A. It is the standard practice of all the factories to make special provisions or make a special cell, I should say, to meet the conditions that they would have to go through in passing to or from California by way of the canal.

Q. Is that a better cell than the one ordinarily put out?

A. It is designed specially to meet the heat conditions.

Q. Is it what is known as a first-class cell?

A. It is a first-class cell.

Q. Did the cells you examined show any signs of

(Deposition of William A. Richey.)
having the liquid in them dried out?

Same objection, motion and exception.

A. The cells examined in general showed a moist condition. However, there were some cells in which the chemical action was so great that the zinc, as we call it, the electrode, which dissolves, giving rise to the chemical action, had eaten through; in that case the cell had dried out. I might say that the effect of heat is not one that would cause the cell to dry out in particular, but it would stimulate the chemical action and the effect of the corrosion product is what causes the deterioration in the cell.

Q. Did you find any signs of this shipment having been wet or having come in contact with water?

[134] Same objection, motion and exception.

A. With the exception of one barrel that indicated a slight wetness of the packing material.

Q. Had that wetness caused any damage?

Same objection, motion and exception.

A. The wetness in this case had only caused a few of the jackets to be bleached.

Mr. WELLES.—You may examine him now, Mr. Platt.

Cross-examination by Mr. PLATT.

Q. Was there any chemical reason why part of this shipment was packed in straw and part in excelsior?

A. The ones that were packed in straw were the barrel lots, and the excelsior lots were packed in boxes.

Q. I asked if there was a chemical reason why

(Deposition of William A. Richey.)

some of them were packed in straw and some in excelsior. A. No, there is not.

Q. Do you know of any reason why they were differently packed or packed with different materials?

A. I cannot give the exact reason.

Q. Do you know any reason? A. No.

Q. Will you describe the chemical constituents of a dry battery cell such as were contained within this shipment?

A. The chemical constituents of a dry battery cell are carbon,—

[135] Q. In what form?

A. Carbon in the form of coke, petroleum coke, and also in the form of graphite.

Q. I meant by form, was it in a mix or a pencil or what?

A. Carbon in the form of a mix. The carbon is mixed with another constituent, manganese oxide or peroxide as it is called sometimes, to form a mix, and this is also an active material. Sal-ammoniac is also added to the mixture, and the material in the mix is moistened with a solution of zinc chloride. That constitutes the active materials in the cell. Then we have two electrodes, a carbon electrode and a zinc can, which makes up the negative chamber.

Q. In other words, if I understand you correctly, you have a zinc can and a carbon centre piece or pencil?

A. Yes, you might call it a pencil.

Q. Surrounded by a mixture containing the chem-

(Deposition of William A. Richey.)

ical constituents in the form of a mass, which you have detailed? A. That is correct.

Q. Which, apart from the quantities of each, constitute all of the ingredients contained within that dry battery cell except the various elements?

A. Yes, and separating the mixture from the zinc can, of course, is a porous lining.

Q. Of what material?

A. Pulp board, wooden.

Q. Then the zinc can does that enter into the [136] chemical action? A. It does.

Q. This mass in this container, surrounding this carbon pencil, is pressed down and sealed in, with the internal wire connections forming a dry battery cell?

A. Forming a dry battery cell; the wire connections, of course, have nothing to do with the dry battery, a dry battery is simply equipped with terminals for external connections.

Q. Equipped with terminals to which the wires are attached? A. Yes.

Q. There is a certain element of liquefaction or liquification, so to speak, of this mass, due to the elements?

A. The mass is moistened, yes, the material is moistened so as to promote diffusion.

Q. As I understand it, to prevent the evaporation of that liquification or liquefaction, the lower and upper ends of this cylindrical device are sealed with some sort of sealing material?

A. The *zinc* can, which constitutes the material for one electrode, is made with a metal bottom, and

(Deposition of William A. Richey.)

this mix is packed into the can around the electrode and the top is sealed.

Q. Around the other electrode?

A. Yes, tamped in around the carbon pencil.

Q. Which is the second electrode?

A. Which is the other electrode, yes.

[137] And then the top of the can is sealed?

A. The top of the can—we put on the top a seal which holds the mass permanently together, as well as prevents evaporation of the solution in the cell.

Q. What is that material composed of which is used to seal the device, as you describe it?

A. It is composed of pitch and rosin, with certain other materials.

Q. Give us the materials and the method of manufacture of the seal, in addition to the ingredients already mentioned?

Mr. WELLES.—Object to the question as being incompetent, irrelevant and immaterial, and not pertinent to the testimony of this witness upon the issues in this action.

A. The method of manufacture is to mix the ingredients that go into the seal and melt them together and pour them into the space left in the battery and to allow it to cool. The ingredients are pitch, rosin and certain other ingredients which are a trade secret and which I do not care to disclose at the present time without the express consent of my employers.

Q. As a witness under oath, called and placed upon the stand by the libelant in this case, and now under

(Deposition of William A. Richey.)

cross-examination, I make a formal demand upon you to answer in full the question as to what ingredients, giving the [138] quantities of each, which went into and constituted the seal which was placed upon each and every one of the dry battery cells contained within the shipment, Libelant's Exhibits 1, 3 and 5, which it was alleged in the libel were damaged while in the possession of the steamship "Eureka"?

Mr. WELLES.—Counsel for libelant calls attention to the fact that this information came to the witness in a professional capacity and that the witness desires to consult his employers before answering. Further, that it is not shown that the witness has anything to do with the making of the cells and for these reasons the question is objected to.

Q. You were familiar, were you not, Mr. Richey, with the chemical constituents and method of manufacture of the seals used upon each and all of the dry cells which were the subject of the shipment on the steamship "Eureka," Libelant's Exhibits 1, 3 and 5?

Mr. WELLES.—The question is objected to on the grounds previously stated, and for the further reason that it is not shown that this witness had anything to do with the making of the particular seals in question.

A. With regard to this shipment referred to, I can [139] make no statement regarding the seal that was put upon those batteries.

Q. What do you mean by that answer?

Same objection.

(Deposition of William A. Richey.)

A. I mean that I am acquainted with the material that goes into the seal at our factory, which, as far as I know, is the material used at the other factories.

Q. Did you not testify on direct examination that the National Carbon Company pursues the same methods and uses the same materials in the manufacture of dry battery cells at all its factories?

Mr. WELLES.—Objected to as the testimony speaks for itself.

A. As far as I know, their methods of manufacture are the same in all the factories.

Q. And the ingredients the same?

A. The ingredients the same.

Q. Have you any reason to believe from your experience as a chemist, and your examination of the cells which were the subject of this shipment, that the cells contained therein were made by any different method of manufacture or contained any different ingredients from those manufactured at the plant with which you are immediately connected?

A. I have not.

Q. Based upon your experience as a chemist, and particularly [140] your experience in the manufacture of carbon dry cells, state whether it is your professional opinion that the seals used upon the dry batteries which were the subject of this shipment were made by the same method and by the use of the same ingredients as those manufactured under your immediate supervision in the east Jersey plant of the libellant?

Same objection.

(Deposition of William A. Richey.)

A. They were so far as I could tell.

Q. Now, Mr. Richey, with this information at hand, will you state at this time the ingredients, giving the name of each, both the chemical name and the name in common usage, if different from the chemical name, of each and every ingredient, together with the quantity thereof, that entered into the manufacture of the seals used upon the dry cells which are the subject matter of this shipment which you examined, as you have heretofore stated?

Mr. WELLES.—Objected to for the reasons previously stated, and because the witness has already answered this question. The witness' attention is called to the fact that in response to that question he stated that he would want to get the consent of his employers before answering, on the ground that the ingredients and method of manufacture are a trade secret, and for that reason counsel [141] directs the witness not to answer this question at this time. Counsel further states that he is willing to give ample opportunity to cross-examine at a later date.

Q. You have heretofore testified, as I understand you, that in the manufacture of dry cells the National Carbon Company manufactures cells different in certain respects, depending upon the temperature to which they are subsequently to be subjected; what is the maximum temperature that you have in mind in manufacturing those that are going to warm climates?

Objected to as incompetent, irrelevant and imma-

(Deposition of William A. Richey.)

terial and in no way relating to the cells in question.

A. In making cells which are to go to tropical regions we make the seal of a minimum melting point of 160 degrees Fahrenheit.

Q. If I understand the matter correctly, the dry battery is manufactured in other respects the same, whether it is going to a hot country or to a temperate climate, the difference in manufacture being confined solely to the seal, is that correct?

A. Not entirely.

Q. Is there, then, in addition to what you have already defined as the elements entering into the manufacture of the seals, an additional difference in the constituents [142] and elements of the dry battery itself, if it is intended to be shipped to tropical countries?

A. Special precaution is taken to increase the melting point of the seal where the seal is known to be exposed to such a heat.

Q. That was what I already understood you to say; I am now asking you whether or not, in the manufacture of a dry battery which is to go to a tropical climate there are any other additional precautions other than those connected with the manufacture of the seal?

A. Special precautions are taken to prevent what are termed leakages of the cells due to the effect of high heat.

Q. Are those connected with the cell?

A. No, with the seal.

Q. With the mix?

(Deposition of William A. Richey.)

A. They are connected with the manufacture of the mix.

Q. In other words, you either increase the quantities of some one or more of the elements of the mix or add others not in those used in temperate climates?

A. We do.

Q. Which, increase of quantity of those used in all dry cells or the introduction of additional chemical constituents?

A. We would make a slight difference in the amount of water that goes into the cell, the amount is slightly decreased.

Q. Is that the only change?

A. That is the only change in the mix.

[143] Q. That is the only change in the mix?

A. Yes.

Q. A slight diminution in the quantity of water?

A. A very slight diminution of the quantity of water.

Q. What would that be, expressed in percentages of the whole, as to the proportions and nature of the ingredients? A. About 10%.

Q. So, as I understand you, apart from the seal, the only difference in the manufacture of a dry cell to go to the tropics and that of one to go to your ordinary temperate zone, is a 10% decrease in the amount of water used in your mix? A. Yes.

Q. Now, Mr. Richey, you have testified that the seals used in the manufacture of your trade in the tropics are built to stand a minimum temperature of 160°; what is the maximum temperature that they

(Deposition of William A. Richey.)

can stand, expressed in degrees Fahrenheit?

A. The maximum temperature would be, I should say, the melting point of the seal; if the seal is melted they would dry out and depreciate very rapidly.

Q. At what temperature would the seal melt so as to permit the escape of the evaporable material in the tropical grade of cells?

A. As already stated, the melting point of the seal, the minimum is 160° ; I should consider 160° . After they reach that temperature the seal would soften so much as to allow the moisture to [144] escape.

Q. You mean 160° is the maximum temperature to which they can be subjected, not the minimum?

A. The minimum would be the melting point of the seal, the maximum would also lie at the melting point, the maximum would also be the melting point.

Q. The maximum and the minimum are the same, then?

A. If I understand the question right, the melting point on the seal we would consider the minimum temperature that the battery would stand. When we manufacture for tropical shipments we figure that the melting point of the seal would be also the maximum temperature that that battery would go through and still be fit for use afterward.

Q. As I understood your testimony some time ago, you stated that in the manufacture of a dry cell for tropical use you built the cells, chemically, to stand a temperature of 160° Fahrenheit as the minimum, that is correct, is it not?

A. As a melting point.

(Deposition of William A. Richey.)

Q. Now I ask you how far above 160° Fahrenheit of temperature would you have to go to reach the danger point when the seals would melt so as to produce evaporation; what is the maximum?

A. When the melting point of the seal is reached, which we consider the minimum of 160°, the seal would be melted from the battery and after that point [145] the battery of course would dry out, and be unfit for service.

Q. What is the life, expressed in months, from the standard of the manufacturer, of dry battery cells such as those shipped on the S. S. "Eureka" for tropical carriage?

A. Judging from our own records at our factory we would say that six months after the date of manufacture the cells would give a reading which would be suitable to ship as a first class cell.

Q. Suppose, then, that a cell manufactured and reading at the expiration of six months as entitled to be shipped as a first class cell, was so shipped, and placed upon the shelves of a purchaser for resale under no unusual circumstances, what, in your experience, is the additional life of the cell?

A. I should say two months would be considered a period that the cells could be held without being unfit for resale.

Q. In other words, the merchantable life of a dry cell such as those shipped on the "Eureka," subjected to no unusual conditions, would be eight months from the date of manufacture?

A. I should say on the average.

(Deposition of William A. Richey.)

Q. In examining these cells that came back as to the straw marks concerning what you testified as showing on the seals, did you note any difference in the upper or interior layers as to the pressure of the straw marks, the indentation [146] of the straw marks? A. No difference, practically the same.

Q. How much does a dry cell weigh?

A. Roughly, two pounds.

Q. And how many in a layer in a barrel?

A. One hundred and twenty-five are packed in a barrel.

Q. That is not what I asked you?

A. How many in a layer in a barrel, they are packed in three layers, 125 in a barrel, equally distributed among the layers.

Q. About 42 dry cells of two pounds each in a layer? A. Yes.

Q. In other words, about 84 pounds in each layer of dry cells? A. Practically that much.

Q. Your observation, from an examination of this shipment showed you, as I understand you, that the indentation in the seals was the same whether the seal had above it no weight except the straw inside the top of the barrel, or whether it had above it two layers weighing 42 pounds each, or a total of 84 pounds of weight, is that correct?

A. As far as I could see there was practically no difference in the depth of the marks.

Q. You have testified that 50% of this shipment of dry cells, as re-examined by you, as unloaded was—you either used the words first class condition or

(Deposition of William A. Richey.)

O.K. and that the other 50% were lowered in amperage below the [147] minimum which the company standardizes for its first class dry cells, is that correct?

A. Not correct, no; the idea is not correct in the question.

Q. Correct me.

A. The statement that I made was this: that there were about 50% that read above the minimum amperage for standard cells.

Q. And about 50% below.

A. About 50% below.

Q. How do you account chemically, for the result that out of a shipment of this size, subjected, as far as you or I know, or my learned friend on the other side— to no unusual conditions, while being unloaded and examined at this date mentioned, the shipment showed that it had fallen in amperage below the company's minimum to the extent of one-half, or 50% and the other 50% had not?

A. I account for that is this way, the cells when sent out would read not 26, but would read 32 or 33, therefore the best cells or the highest reading cells had deteriorated so that they came within the 26 limit, and the cells reading possibly within 27 limit deteriorated so that they had fallen below that, so there was a deterioration in all of the cells.

Q. A commercial deterioration of about 50%?

A. A commercial deterioration of about 50%.

Cross-examination suspended, but not closed
[148] until the witness has an opportunity to con-

(Deposition of William A. Richey.)
sult with his principles. Further examination with reference to the manufacture and chemical constituents of the seal reserved.

Redirect Examination by Mr. WELLES.

Q. Mr. Richey, were these cells that you examined in Jersey City, this lot of cells, were they a class of cells destined for tropical use?

A. As far as I know they were.

Q. Did I understand you to testify that the tropical cells were destined for 160°?

A. I was judging that from the melting point of the seal alone.

Q. Were these particular cells the 160° class?

A. I cannot say that.

Q. If these cells were placed in the barrels and shipped or delivered on a shelf or anywhere else, is their life the same as you have testified to, six months?

A. Under the same conditions of temperature we expect the life to be the same.

Q. The shipping and packing makes no difference in the life, as I understand it?

A. Very slight, I should say. Of course that would be modified according to the shipping conditions. If the cells were handled roughly in shipping they would very likely show it in their readings.

[149] Q. So ordinarily, if these cells had reached California in about 20 or 30 days from the time they were shipped, you would not expect them to show any depreciation there at that time, would you?

(Deposition of William A. Richey.)

A. I would not expect them to show any depreciation beyond what cells would naturally undergo in that length of time.

Q. What proportion of depreciation would you expect the cells to undergo in a shipment in that time?

A. As soon as the cells are manufactured, of course, there is a chemical action at once. This is very slow at the beginning, and of course, if the cells are kept under proper conditions of heat for 30 days there would be—

Q. I didn't ask you that; if they went to California and arrived there in 20 to 30 days from the time they were shipped, going by way of the Panama Canal, what proportion would you expect to run below the test, in California?

A. I should say not over two per cent at the best.

[150] *United States District Court, Western District of Washington.*

NATIONAL CARBON COMPANY,

Libelant,

against

Steamship "EUREKA," Her Engines, etc.

Depositions taken in behalf of the libelant, on the 18th day of December, adjourned to the 19th day of December, 1916, at 10 A. M., at the office of the Philadelphia Shipping Company, Room 551, Bullitt Building, 135 South Fourth Street, Philadelphia, Pa., by agreement of counsel, pursuant to notice.

(Deposition of Charles Kurz.)

APPEARANCES:

Messrs. HARRINGTON, BIGHAM & ENGLAR
(FRANK C. WELLES, Esq.), Proctors for
Libelant.

Messrs. PLATT & PLATT (ROBERT TREAT
PLATT, Esq.), Proctors for Claimant.

It is stipulated that the testimony may be taken by a stenographer, fees to be taxable as costs, signing waived.

[151] The witness Charles Kurz having appeared, his examination was waived by the claimant. The witness Charles Kurz was thereupon called as a witness for the libelant.

Deposition of Charles Kurz, for Libelant.

CHARLES KURZ, being duly sworn and examined as a witness in behalf of the libelant, testifies as follows:

(By Mr. WELLES.)

Q. Mr. Kurz, were you connected with L. Rubelli's Sons in 1915 and 1916? A. Yes, sir, I was.

Q. Was that concern a copartnership or a corporation?

A. It was a copartnership consisting of G. M. Rubelli and myself.

Q. Who was the managing partner? A. I.

Q. I show you Libelant's Exhibit 1 and ask you if that is the bill of lading of a shipment of the National Carbon Company on the S. S. "Eureka" in September 1915? A. It is.

Q. Where was that shipment made from?

(Deposition of Charles Kurz.)

A. New York.

Q. Whom is that bill of lading signed by?

A. By J. U. English.

Q. Who was Mr. J. U. English?

A. Mr. English was connected with the firm of Phelps Brothers & Company, New York.

Q. Who are Phelps Brothers & Company of New York?

A. Phelps Brothers & Company were our New York agents in this case.

[152] Q. The agents for this vessel in New York?

A. Yes.

Q. What position did Mr. English occupy with them? A. Clerk.

Q. I show you Libelant's Exhibits 3 and 5 and ask you what those are?

A. They are the bills of lading covering the shipments made out of Philadelphia on the steamship "Eureka."

Q. Whose shipments?

A. Shipments of the National Carbon Company.

Q. By whom are these bills of lading signed?

A. R. B. Bates.

Q. Who was Mr. Bates?

A. He was at that time assistant traffic manager for L. Rubelli's Sons.

Q. I show you a file of correspondence, telegrams, cables and other papers, and ask you if those were sent by the persons signing same, and received by the persons to whom they are addressed, on or about their dates?

(Deposition of Charles Kurz.)

A. They were, and I have initialed each one of them.

Q. I ask you if you have in your possession the originals of which copies are contained in this file?

A. No, I have not.

Q. Do you know where such originals are?

A. I do not.

Mr. WELLES.—I offer these letters, telegrams, cables and other papers initialed by Mr. Kurz in evidence.

Mr. PLATT.—Claimant makes no objection to the various documents comprised within the offer on account of their form, or as to whether or not they are original copies or translations, and admits that the translations were made by the witness Kurz, and that they were sent by the persons signing the same, and received by the persons to whom they were addressed in due course at or about the dates thereof, but as to their competency, materiality and relevancy he will make specific objection later on.

Q. Was the firm of L. Rubelli's Sons acting as agents for the steamship "Eureka" at that time?

A. Yes.

[153] Q. Was the freight for these shipments prepaid to you by the National Carbon Company?

A. Yes, sir, the freight was prepaid.

Q. What was the Quaker Line?

A. The Quaker Line was a trade name which L. Rubelli's Sons used in connection with the steamers they had sailing from Philadelphia to the Pacific Coast, and it was used in order to show the connec-

(Deposition of Charles Kurz.)

tion with Philadelphia, being the Quaker City.

Q. Who was Mr. H. M. Williams?

A. Mr. H. M. Williams was the president of H. M. Williams Company who chartered the S. S. "Eureka" from the Crossett Western Lumber Company for consecutive westbound trips over a period of one year. He was also the general manager of the Oregon-California Shipping Company, to whom the H. M. Williams Company sublet the "Eureka" under the same form and conditions of charter as the Williams Company had with the Crossett Western Lumber Company with the exception that it was \$25 per day more.

Q. Did the Crossett Western Lumber Company own the "Eureka"?

A. No, they were the time charterers of the "Eureka." The steamer was owned by the Pacific Coast Company.

Q. Who was Mr. John J. Dwyer?

A. He is the western manager of Phelps Brothers & Company, located at Chicago.

Q. Was he, at the time these shipments were made?

A. He was then, yes, sir.

Q. Wasn't it a fact, Mr. Kurz, that there were 15 barrels short shipped in this shipment that were never [154] placed on board the "Eureka"?

A. Yes, sir.

Q. What was done with those fifteen barrels?

A. They were returned to the order of the National Carbon Company.

Q. Do you remember whether Mr. Mitchell came

(Deposition of Charles Kurz.)

down to Philadelphia about October 9th? A. I do.

Q. Did he have any discussion with you then relating to these shipments? A. He did.

Q. At that time did he offer to pay the expenses of unloading this cargo and landing the same at Colon?

Mr. PLATT.—Objected to on the ground that under the terms of the bill of lading a consignor or consignee, either one, has not any right to require the carrier to break a shipment at a point designated by him, and that under the evidence in this case as already brought out by the libelant the cargo was delivered to the libelant at the port of New Orleans and accepted by it, and it is incompetent, irrelevant and immaterial what he may have stated, demanded or requested at an earlier date than the said delivery and acceptance at New Orleans, and also incompetent, irrelevant and immaterial as not within the rights under the bill of lading as resting in any consignor or consignee, as more particularly set forth above; also incompetent, irrelevant and immaterial on the ground that the shipping agents were not such general [155] agents of the carrier named in the bill of lading, to wit, the Oregon-California Shipping Company, and no demand, request or negotiations with the witness or with the shipping agents would be a legal request, demand or notice to or upon the carrier or the vessel; which objection may be considered made as a continuing objection to all inquiries of a similar nature where the form of the question apprises counsel for claimant as to the answer to be expected, and where the form of the ques-

(Deposition of Charles Kurz.)

tion does not so disclose, may be considered as a motion to strike out the answer on the same grounds and for the same reasons.

Mr. WELLES.—Excepted to on the ground that it is incompetent, irrelevant and immaterial and based upon conclusions of law not warranted by the evidence. A. He did.

Q. Did he call upon you subsequently to that at Philadelphia, about October 23d? A. He did.

Q. Did he at that time repeat his offer?

Same objection. Same exception.

A. He did.

Q. Did he offer at that time to pay all costs and expenses of unloading and landing the goods at Colon?

[156] Same objection and same exception.

A. He did.

Q. Did he tell you at both of these times that these goods would be greatly damaged if they were not unloaded immediately at Colon?

Same objection and exception.

A. He did.

Q. How long would it ordinarily take the "Eureka" to go around to California by way of the Canal? A. About 30 days.

Q. How long would it take this vessel ordinarily to go around by way of the Straits of Magellan to California points? A. About 90 days.

Q. Could this vessel have gone around by way of Magellan?

A. She could, if she could have gotten oil, but there was not any oil available.

(Deposition of Charles Kurz.)

Q. Was it or not possible for the vessel to have made the Magellan trip? A. No.

Q. This vessel is an oil burning vessel, is she?

A. Yes, sir.

Q. Are you familiar with the S. S. "Eureka"?

A. Yes, sir.

Q. Has she any ventilators? A. No, sir.

Q. Did this vessel ever continue its voyage and go through the Canal?

A. She did not continue that voyage. She left Colon and went up to New Orleans and from New Orleans she came to New York under a charter to the [157] Southern Pacific Company.

Q. Did she return immediately to New Orleans or did she stay down there some time?

A. She stayed down there for some time.

Q. When she came to New Orleans did she discharge her cargo there? A. Yes, sir.

Q. Did you go down to New Orleans in connection with the discharge of her cargo? A. I did.

Q. Did you see the National Carbon Company shipments unloaded there, or part of them?

A. I saw the whole cargo on the pier, I must have seen the barrels, but I didn't take any particular interest in them, and I don't remember whether I saw the barrels or not.

Q. Did you see Mr. Mitchell testing this cargo of dry batteries at New Orleans?

A. No, I didn't see him test it, but he told me that he was going down, and I understood that he was on the pier testing the barrels.

(Deposition of Charles Kurz.)

Q. In New Orleans, you assisted in the unloading of the vessel and getting the cargo forward to destination? A. Yes, sir.

Mr. WELLES.—You may cross-examine.

Cross-examination by Mr. PLATT.

Q. The S. S. "Eureka" was an all steel vessel, was she not? A. Yes, sir.

Q. Without ventilators? A. Yes, sir.

[158] Q. Did you see the steamer when she left Philadelphia for the Canal Zone? A. Yes, sir.

Q. She had on her deck, did she not, a cargo of steel beams, a shipment, I mean?

A. She didn't have a cargo, she had a few beams on deck.

Q. Do you remember now, or can you, by consulting your manifest, tell how many tons there were in that deck cargo?

A. Yes, sir, we can; the exact weight was 68,400 pounds.

Q. How was that stowed on the deck?

A. It was lashed down.

Mr. WELLES.—We object to this question and move that the answer be stricken out, also all reference to the stowage of cargo on the ground that it is incompetent, irrelevant and immaterial, it having been shown that the libelant offered to pay all costs and expenses of shifting the same and landing libelant's cargo at Colon, and further, it is not shown how much of the cargo it would be necessary to move in order to unload the cargo of libelant.

Q. Can you tell from any data in your possession

(Deposition of Charles Kurz.)

whereabouts in the hold of the "Eureka" the shipment of the National Carbon Company was stowed?

Same objection.

A. I cannot without consulting the plan of the ship, which we do not seem to find in the office.

Q. Do you remember whether or not any considerable [159] portion of the cargo was stowed in the lower hold?

A. I don't remember definitely, but I think there was some of the shipment stowed in the lower hold.

Mr. WELLES.—I move that the answer of the witness be stricken out on the ground that it is incompetent, irrelevant and immaterial, and testifying to facts not within his knowledge.

Q. You do remember, as I understand you, that a certain proportion of the shipment of the National Carbon Company was stowed in the lower hold?

A. Yes.

Same objection and motion.

Q. Can you state from any data in your possession at this time how many barrels were so stowed?

Same objection and motion.

A. According to the stowage book which we have here there were 125 barrels stowed in the No. 1 lower hold.

Same objection and motion.

Q. Mr. Kurz, when the slide at the Canal continued after the arrival of the vessel for some little time, it is a fact, is it not, that your firm as well as the Oregon-California Shipping Co. at Portland made a thorough investigation of all possible and practicable

(Deposition of Charles Kurz.)

methods of dispatching the boat or cargo to the points of destination?

Same objection.

A. Our firm did, I don't know what the people on the Pacific Coast did.

[160] Same motion.

Q. Now, in addition to the disclosures as to those efforts made by your firm, as shown by the exhibits heretofore put in evidence, by the libelant, your firm endeavored to arrange transshipment across the canal and transportation up the west coast with other carriers, did it not? A. Yes.

Q. Among others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Steamship Company, the Panama Pacific Line at New York, the owners of the Edison Line at Boston, the Alaska Steamship Company, and Olsen & Mahoney? A. Yes.

Mr. WELLES.—Objected to, and I move that the question and answer of the witness with respect to what was done for the forwarding of cargo other than libelant's be stricken out on the ground that it is incompetent, irrelevant and immaterial under the issues in this case.

Q. And as to your efforts with all of the transportation companies named in the last question as well as those named in the various exhibits placed in evidence by the libelant, you were unable to arrange for the forwarding of the cargo by rail either across the

(Deposition of Charles Kurz.)

Isthmus or via the Tehuantepec Railroad because of the lack of carriers on the Pacific Coast to take the goods at the point of discharge [161] on the Pacific side?

A. That is right, up to the time I got to Portland. Same objection.

(By Mr. WELLES.)

Q. When did you get to Portland?

A. I arrived at Portland about November 1st.

Q. You were there only four or five days before the vessel came back? A. Yes.

(By Mr. PLATT.)

Q. In addition to the efforts to arrange the transshipment of the cargo across the Isthmus and up the west coast, which proved impossible, for the reasons that you have already stated, investigation was made as to the taking of the vessel and cargo to the west coast through the Straits of Magellan, was there not? A. Yes, sir.

Same objection.

Q. And the same had to be abandoned, is it not a fact, because being an oil-burner there was no supply of fuel oil on the east or west coast of South America to make it safe for her to make the trip?

A. That is right.

Same objection.

Q. It is a fact, is it not, that the Government would not permit the unloading of vessels detained at the canal either on the west coast or the east coast unless the parties so unloading had definite arrange-

(Deposition of Charles Kurz.)

ments made and carriers ready to take the cargoes when so unloaded?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial, consisting merely of [162] hearsay. A. It is.

Q. As I understood your testimony on your direct examination, at the various interviews had with Mr. Mitchell, traffic manager of the National Carbon Company, in Philadelphia in October, 1915, with reference to the disposition of that portion of the cargo of the steamship "Eureka" in which he was interested, it was in the nature of a discussion as to what was best to be done and what could be done and what should be done with his portion of the cargo, but that there was no demand made upon you for the delivery of this cargo at the Canal Zone?

A. Mr. Mitchell, of the National Carbon Company, came on to Philadelphia and advised me that his goods were perishable and that some arrangement had to be made immediately to get the cargo to its destination or to bring it back to Philadelphia or New York, and advised me that if we could not make such arrangements that he was ready to take delivery of his goods at Colon, pay for the expense of discharging his goods, as well as such other goods as had to be discharged to get at his goods, and pay for the reloading of the other goods on board.

Q. And subsequently the boat was sent by the Oregon-California Shipping Co. to New Orleans, and there the cargo of the National Carbon Company was unloaded?

(Deposition of Charles Kurz.)

A. I don't [163] know who the boat was sent by but she left Colon and went to New Orleans where the cargo was discharged.

Q. And that portion of the cargo which had been shipped by the National Carbon Company was turned over at New Orleans to the National Carbon Company, by Mr. Mitchell, its traffic manager, was it not? A. Yes, sir.

Q. Did you know at that time of any conditions that were made in connection with that delivery by the vessel or those in authority over it at the time and the National Carbon Company at the time of that delivery?

A. I don't know of any special arrangement that was made.

Q. Do you know whether or not, at the time of said delivery, any charges of any kind or nature were exacted by the vessel or those in authority over it as a condition precedent to the delivery to and receipt by the National Carbon Company of its portion of the shipment?

A. I don't know of any such charges.

Q. Do you know of any reason, as far as the ship was concerned, or those in authority over it at New Orleans, why there should have been any delay in the handling of the National Carbon Company shipment between New Orleans and Jersey City, from and after the time that delivery was made to the National Carbon Company by the vessel of its portion of the shipment? A. I do not.

Q. I hand you a telegram which you have hereto-

(Deposition of Charles Kurz.)

fore [164] identified, dated at Cleveland, Ohio, November 3, 1915, addressed to your firm in Philadelphia, signed by the National Carbon Company, and ask you if that telegram was received at or about the time it bears date?

A. That was received.

Claimant asks that the same be received as an exhibit on behalf of the claimant and so marked. The telegram is marked Claimant's Exhibit "A."

Q. I hand you now, Mr. Kurz, a telegram from your firm to the Oregon-California Shipping Co. under date of October 5, 1915, and ask you if that telegram was sent by you on that date?

A. It was sent.

The telegram is offered in evidence. It is marked Claimant's Exhibit "B."

Q. I now hand you what purports to be a telegram under date of October 16, 1915, addressed to your firm from the Oregon-California Shipping Co., Portland, Oregon, and ask you if that telegram was received by you? A. It was.

The telegram is offered in evidence. It is marked Claimant's Exhibit "C."

Q. I now hand you a telegram dated October 17, 1915, Portland, Oregon, addressed to your firm and signed by the Oregon-California Shipping Co., and ask you if that telegram was received by you in the course of business? A. It was.

[165] The telegram is offered in evidence. It is marked Claimant's Exhibit "D."

Q. I now hand you a telegram dated October 25,

(Deposition of Charles Kurz.)

1915, at Portland, Oregon, addressed to you individually, signed by the Oregon-California Shipping Co., bearing your O. K. and ask you if that telegram was received by you in due course of business?

A. It was.

The telegram is offered in evidence. It is marked Claimant's Exhibit "E."

Q. I now hand you what purports to be a telegram from your firm to Major F. C. Boggs, Chief of the Panama Canal Office at Washington, D. C., undated, and his reply to you under date of November 9, 1915, both bearing your O. K., and ask you if that is your telegram to and their reply from the Panama Canal Office at Washington, and if they were sent and received in due course of business? A. They were.

The telegrams are offered in evidence. They are marked Claimant's Exhibits "F" and "G."

(By Mr. WELLES.)

Q. What was the date of this undated one?

A. The one undated was sent about—I think it was the 8th or 9th of November.

(By Mr. PLATT.)

Q. I hand you what purports to be a copy of a cablegram [166] from Captain Bagott at Colon to you at Portland, under date of November 1, 1915, and ask you if that is a copy of a cable actually received by you from the captain? A. It is.

The cablegram is offered in evidence. It is marked Claimant's Exhibit "H."

Mr. PLATT.—I ask that counsel make the same stipulation on the copy question.

(Deposition of Charles Kurz.)

Mr. WELLES.—There is no objection to the proof of this as a genuine cable having been actually sent and received at or about the date therein stated, but same is objected to on the ground of being incompetent, irrelevant and immaterial upon the issues in this action, in view of the evidence.

Q. Your trips to Portland and to New Orleans were made for the purpose, were they not, to do everything you could to facilitate the efforts of the Oregon-California Shipping Co. to get this cargo forward to destination by some means?

A. My trip was for the purpose of getting some definite action, as the shippers were after us for information as to what was going to be done, and I didn't care whether I was helping the Oregon-California Shipping Co. or anyone else, all I was interested in was getting that cargo to its destination.

[167] Q. And your connection with the cargo, as I note from your correspondence, was that of shipping agent only? A. That is right.

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial, and I move that the answer be stricken out as a self-serving declaration, contrary to the evidence.

Q. You did not at any time claim to anyone or with anyone to be the general agent of the Oregon-California Shipping Company?

A. Well, we did advertise ourselves as general agents in the east of the Oregon-California Shipping Co.

Q. I hand you now Libelant's Exhibit 39, in which

(Deposition of Charles Kurz.)

you use the phrase "in reply we beg to refer you to our letter of December 3d, wherein we advised you that Messrs. Phelps Brothers & Co., and ourselves acted only as agents in the solicitation and providing of cargo for this steamer?"

A. That is right, that is what we did do, the general agency that I referred to meant that we had charge of the different subagents but only as to the solicitation of cargo.

Q. In other words, you at no time held yourself out, and do not now, to have ever been the general agents in the broad general sense of a complete agency for all matters of every kind and nature of the Oregon-California Shipping [168] Co?

A. We were only the general agents in so far as picking up freight was concerned; booking freight.

Mr. WELLES.—I object and move to strike out the question and the answer on the ground that they are incompetent, irrelevant and immaterial and a mere conclusion of the witness.

Q. You sent various cables to the captain at Colon which are included in the exhibits which have been introduced in your testimony by the libelant, and various telegrams and other communications to other parties, in which you issued certain directions and made certain representations of matters of fact; I ask you whether you had any authority from the Oregon-California Shipping Co. to make any such representations of fact or to issue any orders to the captain of the vessel?

A. I had authority that I got out at Portland.

(Deposition of Charles Kurz.)

Mr. WELLES.—Libelant objects and moves to strike out the question and the answer on the ground that they are incompetent, irrelevant and immaterial, and a mere conclusion, and that the letters, messages and other documents in evidence speak for themselves.

Q. Prior to your going to Portland?

A. I had no authority other than as booking agent, and whatever I did was done to bring about some definite action.

[169] Q. Any letters, telegrams or directions which you may have issued, or statements of fact, after you went to Portland,—from whom did you receive any authority to make such representations of fact or to issue such instructions?

A. Mr. Williams.

Same objection and motion.

Q. Did the Board of Directors of the Oregon-California Shipping Company ever authorize you with reference to their property rights to make any representations of matters of fact or to issue any instructions about property which was in their control or concerning the steamship “Eureka” which they had under charter?

A. Not that I know of; my name was only signed to those cables because I started to cable the captain. He knew my name; I don't know whether he would know Mr. Williams' name.

Redirect Examination by Mr. WELLES.

Q. When did you first learn that fuel oil could not be obtained to go around by way of Magellan?

(Deposition of Charles Kurz.)

A. I think it was about ten days after the ship arrived at Colon.

Q. Prior to the telegram that has been put in evidence by the claimant? A. Yes, sir.

Q. Was any cargo at all unloaded at Colon?

A. No.

Q. The whole cargo was brought back to New Orleans, is that right? A. Yes, sir.

Q. At New Orleans do you recall a demand made by Mr. [170] Mitchell in writing upon Mr. Williams?

Mr. PLATT.—Objected to on the ground that the same is incompetent, irrelevant and immaterial because under the testimony as heretofore introduced the deterioration in the value of the subject of the shipment by the libelant upon the SS. "Eureka" was due to causes specifically excepted in the bill of lading under which the goods were shipped, to wit, deterioration arising from heat and confinement in the hold of the vessel, both in and of themselves, and as connected with the prolongation of the voyage, which was likewise within the exceptions of the terms of the bill of lading, and due likewise to the deterioration in value or deterioration in quality, or both, due to the inherent character of the commodity under carriage, from any liability for which the carrier was expressly excepted by Clauses 1, 2, 3 and 8 of the bill of lading, Libelant's Exhibits 1, 3 and 5, the benefit of each and all of which provisions is expressly claimed by the vessel and the claimant, as well as all other provisions of the bill of lading,

(Deposition of Charles Kurz.)

whether specifically enumerated or not, and for each and all of these reasons the question and the answer thereto are each incompetent, irrelevant and immaterial; which objection the claimant at [171] this time makes to each and all of the inquiries relating to damage to the cargo, deterioration in quality, depreciation in value, or any other shrinkage or loss in market value of every kind and nature, without renewing this objection to each and every succeeding inquiry of the same character, and in addition thereto, the carrier and the claimant places the same objection in the record as a motion to strike out as incompetent, irrelevant and immaterial each and every answer relating to proof of damage on the same grounds and for the same reasons, where the form of the question does not indicate in advance that the question of damage is the question under consideration, and makes this motion as a continuing motion to each and all answers relating to the question of damage, without the necessity of renewing the said motion to each and all answers wherein the subject matter of the answer is in whole or in part the question of damage, depreciation, deterioration, shrinkage or loss of market or other value. Also as incompetent unless the witness saw the writing.

Mr. WELLES.—Same exception as heretofore.

A. I don't recall a demand, but I recall that Mr. Mitchell served Mr. Williams with a letter.

[172] Q. Had the cargo been delivered to Mr. Mitchell at that time? A. No.

(Deposition of Charles Kurz.)

Q. Did you see Mr. Mitchell serve Mr. Williams with this letter? A. I did.

Q. Had Mr. Mitchell told you previously that he was going to serve a written demand on Mr. Williams?

A. Mr. Mitchell told me that he would of course have to consult an attorney at New Orleans and take such action as would protect the interests of the National Carbon Company, and that he would be serving Mr. Williams with either a libel or a letter, whereupon, or shortly thereafter, Mr. Mitchell handed Mr. Williams a letter.

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, because what Mr. Mitchell meant or told the witness would not bind the carrier or the vessel, as the witness has already testified that he was not the agent of the vessel or carrier, but only special agent for the solicitation of freight and shipping of cargo.

Same exception.

Mr. PLATT.—I move to strike out the answer on the same grounds as the objection, and also on the further ground that it has not been shown that the letter contained anything more than expressions of felicity.

[173] Same exception.

Q. Do you recall that Mr. Mitchell, in talking with you on the two trips he made to Philadelphia to see you, offered to go down to the Canal Zone himself and look after the cargo at Colon if you would unload it there for him?

(Deposition of Charles Kurz.)

Same continuing objection. Same exception.

A. He did.

[174] To the offer in evidence of cablegram dated Philadelphia, October 4, 1915, addressed to Captain Bagott, steamer "Eureka," Colon, Panama, signed Rubelli, claimant, makes no objection.

The cablegram is marked Libelant's Exhibit 42.

Mr. PLATT.—As to the cablegram addressed to Rubells, Phila., the first word of which is "ALYL-WEIGHT," signed by Bagott, captain of the ship, with translation attached, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 43 and the translation thereof Libelant's Exhibit 43-A.

Mr. PLATT.—To the offer in evidence of the cablegram dated Portland, Oregon, October 4, 1915, addressed to L. Rubelli's Sons, Philadelphia, signed by the Oregon-California Shipping Company, claimant objects to the same as incompetent, irrelevant and [175] immaterial, as not within any of the issues presented by the pleadings.

Mr. WELLES.—Exception, among other reasons, on the ground that this is pertinent as an admission by the carrier.

The telegram is marked Libelant's Exhibit 44.

Mr. PLATT.—As to the telegram dated Philadelphia, October 5, 1915, signed by L. Rubelli's Sons, and addressed to the Panama Railroad Company, claimant makes no objection.

The telegram is marked Libelant's Exhibit 45.

Mr. PLATT.—As to the offer of the telegram

(Deposition of Charles Kurz.)

dated New York, October 6, 1915, sent to Rubelli's Sons, Philadelphia, signed Panama Railroad, claimant makes no objection.

The telegram is marked Libelant's Exhibit 46.

Mr. PLATT.—As to the libelant's offer of the telegram dated October 5, 1915, addressed to Rubelli's Sons, Philadelphia, and signed by the Oregon-California Shipping Company, the claimant makes the objection that the same is immaterial and irrelevant as not within any of the issues in this case, and claimant also claims the benefit of all the continuing objections heretofore interposed upon the prior offers.

[176] Mr. WELLES.—Libelant submits that this telegram is admissible as an admission of the carrier and as part of the *res gestae*.

The telegram is marked Libelant's Exhibit 47.

Mr. PLATT.—To the offer of the letter from the Quaker Line, dated October 8, 1915, addressed to the Honorable Woodrow Wilson, President, United States of America, Washington, D. C., the claimant objects on the ground that the same is incompetent, irrelevant and immaterial, in that it is not a communication by any person, firm or corporation at any time authorized, by agency or otherwise, to make any representations on behalf of the SS. "Eureka," its then owners or subsequent owners, its charterers or navigators, and that libelant is bound, furthermore, by having placed in evidence Libelant's Exhibits 33, 39 and 40, wherein any authority of the signer of this letter is expressly disclaimed by

(Deposition of Charles Kurz.)

L. Rubelli's Sons and Charles Kurz, General Manager, doing business as the Quaker Line, or any of its agents, to act for the Oregon-California Shipping Company or the steamship "Eureka" other than as soliciting agents and for the providing of cargo, and claimant further objects to the admission of this letter on all of the continuing objections heretofore [177] placed in the record.

Libelant makes continuing exception as heretofore to all objections as to exhibits.

The letter is marked Libelant's Exhibit 48.

Mr. PLATT.—To the libelant's offer in evidence of cable dated Colon, October 9, 1915, addressed to Rubelli, Philadelphia, signed by Baggott, captain of the ship, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 49.

Mr. PLATT.—As to libelant's offer in evidence of the telegram dated Philadelphia, October 9, 1915, addressed to the Oregon-California Shipping Co., Portland, Oregon, signed L. Rubelli's Sons, claimant makes its continuing objections as heretofore placed in the record.

The telegram is marked Libelant's Exhibit 50.

Mr. PLATT.—As to the letter of October 9, 1915, addressed to the Oregon-California Shipping Co., Portland, Oregon, signed L. Rubelli's Sons, claimant makes its continuing objection as heretofore interposed in the record.

The letter is marked Libelant's Exhibit 51.

Mr. PLATT.—As to the cablegram dated October 11, 1916, addressed to Captain Baggott, steamer "Eu-

(Deposition of Charles Kurz.)

reka," Colon, sent by L. Rubelli's Sons, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 52.

[178]. Mr. PLATT.—As to libelant's offer of the cablegram dated October 11, 1915, from Colon, addressed to Rubelli, Philadelphia, and signed by Captain Bagott, captain of the ship, libelant makes no objection.

The cablegram is marked Libelant's Exhibit 53.

Mr. PLATT.—As to the offer by libelant of cablegram dated Colon, October 11, 1915, addressed to Rubelli's Sons, Philadelphia, signed Baggott, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 54.

Mr. PLATT.—As to the offer by libelant of telegram dated Philadelphia, October 11, 1915, addressed to the Chief of Office, Panama Canal, Washington, D. C., signed L. Rubelli's Sons, claimant makes its continuing objection.

The letter is marked Libelant's Exhibit 55.

Mr. PLATT.—As to the offer of the libelant of telegram dated October 12, 1915, addressed to L. Rubelli's Sons, Philadelphia, signed by the Panama Canal Office, Washington, claimant makes its continuing objection.

The telegram is marked Libelant's Exhibit 56.

Mr. PLATT.—As to the offer made by libelant of letter dated Washington, D. C., October 11, 1915, [179] addressed to L. Rubelli's Sons, Philadelphia, Pa., and signed F. O. Boggs, Major, Corps of Engineers, U. S. A., Chief of Office, with circular memo-

(Deposition of Charles Kurz.)

randum of October 8th, 1915, signed by the same party attached, claimant makes no objection.

The letter is marked Libelant's Exhibit 57, and the circular attached is marked Libelant's Exhibit 57-A.

Mr. PLATT.—As to the offer in evidence by the libelant of the telegram dated Portland, Oregon, October 11, 1915, signed by the Oregon-California Shipping Co., and addressed to L. Rubelli's Sons, at Philadelphia, claimant makes its same continuing objection, and further, that the same is incompetent, irrelevant and immaterial as not within any of the issues in this case.

Mr. WELLES.—Libelant submits that this telegram is admissible as an admission of the carrier, and as part of the *res gestae*.

The telegram is marked Libelant's Exhibit 58.

Mr. PLATT.—As to the offer by libelant of day-letter dated Philadelphia, October 12, 1915, addressed Oregon-California Shipping Co., Portland, Oregon, and signed L. Rubelli's Sons, claimant, makes its continuing objection.

[180] The telegram is marked Libelant's Exhibit 59.

Mr. PLATT.—As to the offer by libelant of letter dated October 13, 1915, signed by L. Rubelli's Sons and addressed to Oregon-California Shipping Co., Portland, Oregon, claimant makes its continuing objection.

The letter is marked Libelant's Exhibit 60.

Mr. PLATT.—As to the night-letter of October

(Deposition of Charles Kurz.)

14, 1915, offered by libelant, signed by Rubelli's Sons, Philadelphia, and addressed to the Oregon-California Shipping Co., Portland, Oregon, claimant makes its continuing objection.

The night-letter is marked Libelant's Exhibit 61.

Mr. PLATT.—As to the offer by libelant of a letter dated Washington, D. C., October 14, 1915, addressed to L. Rubelli's Sons, signed by F. G. Boggs, Major, Corps of Engineers, U. S. A., Chief of Office, and attached thereto copy of Libelant's Exhibit 57-A, circular of the Panama Canal authorities of October 12, 1915, and circular of Panama Canal Office dated October 13, 1915, claimant makes no objection.

The letter and circulars attached are marked Libelant's Exhibits 62-A, 62-B, and 62-C respectively.

Mr. PLATT.—As to the offer by the libelant [181] of cablegram dated October 15, 1915, from Colon, signed by Baggott, captain of the ship, addressed to Rubelli at Philadelphia, claimant makes no objection.

The cablegram is marked Libelant's Exhibit 63.

Mr. PLATT.—As to libelant's offer of the day-letter of date October 15, 1915, signed by L. Rubelli's Sons at Philadelphia, addressed to Oregon-California Shipping Co., Portland, Oregon, claimant makes its continuing objection.

The day-letter is marked Libelant's Exhibit 64.

Mr. PLATT.—As to the offer by libelant of telegram dated Philadelphia, Pa., October 16, 1915, signed Rubelli's Sons, addressed to the Oregon-California Shipping Co., Portland, Oregon, claimant

(Deposition of Charles Kurz.)

makes its continuing objection, and also the further objection that it is incompetent, irrelevant and immaterial, in that it is an attempt to pass upon a proposition of law.

Mr. WELLES.—Libelant submits that this telegram is competent as an admission and as part of the *res gestae*, and libelant makes this as a continuing statement as to all objections to the exhibits.

The telegram is marked Libelant's Exhibit 65.

[182] Mr. PLATT.—As to the offer of libelant of telegram dated October 18, 1915, signed L. Rubelli's Sons, addressed to the Oregon-California Shipping Co., Portland, Oregon, claimant objects that it is incompetent, irrelevant and immaterial for the reasons stated on pages 18, 19 and 20, of the record, also on pages 24 and 25 of the record, also on pages 44 and 45 of the record, and for the reasons stated in all the other continuing objections.

The telegram is marked Libelant's Exhibit 66.

Mr. PLATT.—As to the further offer at this time by the libelant of the telegram dated October 19, 1915, signed L. Rubelli's Sons, addressed to the Oregon-California Shipping Company, Portland, Oregon, heretofore marked Libelant's Exhibit 13, as identified by the witness Kurz, claimant makes its continuing objections, and that the same is incompetent to bind the vessel on the ground that the terms of carriage were defined by the bill of lading, and that the consignor of a portion of the shipment has no legal right, under the bill of lading, to require the ship to discharge the cargo or a portion of it at a

(Deposition of Charles Kurz.)

point designated by him, but that the carrier's obligations, as well as its rights, to the disposition of the goods under the [183] circumstances as developed at the Panama Canal are defined by the bill of lading, and that under the evidence as introduced up to this time, the ship performed its legal obligations under the bill of lading, and on the further ground that the instrument offered in evidence is immaterial because it has been heretofore testified to by the witness Mitchell, on behalf of the libelant, that libelant accepted delivery of the goods at the port of New Orleans, and any negotiations or exchange of letters or telegrams or oral representations of negotiations as to discharge at some other port are incompetent, irrelevant and immaterial.

Mr. WELLES.—Libelant moves to strike out this objection as incompetent, irrelevant and immaterial, not based on facts in evidence, and upon the further ground that the testimony speaks for itself, and on the additional ground that the charterers of the vessel or their agents or servants are not entitled to rely on the provisions of the bill of lading in view of the facts proved in this case.

Mr. PLATT.—As to the offer by libelant of the circular dated Philadelphia, October 22, [184] 1915, signed by L. Rubelli's Sons, the claimant makes all of the continuing objections heretofore interposed, and also the further objection that it is incompetent to bind the owners of the ship, past or present, the ship, its charterers or any of them, by reason of the fact that heretofore the libelant has introduced

(Deposition of Charles Kurz.)

in evidence Libelant's Exhibits 33, 39 and 40, to the effect that L. Rubelli's Sons were only agents for the solicitation and providing of cargo, and were not the general agents of the ship or its owners or charterers, hence the statements contained in the document now under offer are incompetent to bind the said ship, owners and charterers, and the statements therein contained are incompetent, irrelevant and immaterial for all of said reasons.

Mr. WELLES.—Libelant submits that this statement is competent as an admission by the agents of the charterers and of the vessel and as part of the *res gestae*, and libelant wishes to state at this time that Libelant's Exhibits 33, 39 and 40, referred to by counsel for claimant, were offered, not as defining the extent of the agents' authority, which is evidently a self-serving [185] declaration, by which libelant is not bound, but were offered among other reasons as part of the *res gestae* and as an admission that the agents of the vessel had notice of libelant's claim.

The circular is marked Libelant's Exhibit 67.

Mr. PLATT.—As to the offer by libelant of the telegram dated Philadelphia, October 23, 1915, addressed to the Oregon-California Shipping Co., at Portland, Oregon, and signed by Rubelli's Sons, claimant makes its continuing objection.

The telegram is marked Libelant's Exhibit 68.

Mr. PLATT.—As to the offer by libelant of the telegram dated Portland, Oregon, October 22, 1915, signed by Oregon-California Shipping Co. and ad-

(Deposition of Charles Kurz.)

dressed to L. Rubelli's Sons, Philadelphia, claimant makes no objection.

The telegram is marked Libelant's Exhibit 69.

Mr. PLATT.—As to the offer of letter from the National Carbon Company, signed by Anson J. Mitchell, Traffic Manager, addressed to L. Rubelli's Sons, dated October 25, 1915, claimant makes no objection.

The letter is marked Libelant's Exhibit 70.

At this point the original of Libelant's Exhibit 21 is reoffered as identified by the witness [186] Kurz.

Mr. PLATT.—Continuing objection and objection made at the time of the original offer.

As to the offer by libelant of cablegram dated Portland, Oregon, October 29, 1915, addressed to Bagott, master of the steamship "Eureka," at Colon, signed by Charles Kurz, claimant makes all of its continuing objections heretofore interposed, and in addition objects that the cablegram is incompetent, irrelevant and immaterial in that the witness Kurz has already testified that the attempted transportation of the cargo of the S. S. "Eureka," as therein discussed, became impossible because ships were not obtainable on the west coast for carriage from Colon or Salinas Cruz, the termini respectively of the Panama Railroad and the Tehuantepec Railroad.

Mr. WELLES.—Libelant submits that this cablegram is admissible as a part of the *res gestae*.

The cablegram is marked Libelant's Exhibit 71.

Mr. PLATT.—As to the cablegram dated Port-

(Deposition of Charles Kurz.)

land, Oregon, November 3, 1915, addressed to Bagott, master of the S. S. "Eureka," at Colon, signed by Kurz, claimant interposes each and all of the continuing objections.

The cablegram is marked Libelant's Exhibit 72.

[187] Mr. PLATT.—As to the offer by libelant of the cablegram dated November 4, 1915, at Colon, signed by Captain Bagott, and addressed to Kurz, Portland, Oregon, claimant interposes each and all of the continuing objections.

The cablegram is marked Libelant's Exhibit 73.

Mr. PLATT.—As to the offer by libelant of cablegram dated Portland, Oregon, November 4, 1915, addressed to Captain Bagott, at Colon, and signed Kurz, with translation below, claimant again interposes each and all of the continuing objections.

The cablegram is marked Libelant's Exhibit 74.

Mr. PLATT.—As to the cablegram addressed to Kurz at Portland, Oregon, and signed by Captain Bagott, with translation attached, bearing date November 5, 1915, claimant interposes each and all of its continuing objections.

The cablegram is marked Libelant's Exhibit 75 and the translation thereof Libelant's Exhibit 75-A.

Mr. PLATT.—As to the offer by libelant of cablegram dated Colon, November 5, 1915, addressed to Kurz, Portland, and signed Bagott, [188] claimant interposes each and all of its continuing objections.

The cablegram is marked Libelant's Exhibit 76 and the translation thereof Libelant's Exhibit 76-A.

(Deposition of Charles Kurz.)

Mr. PLATT.—As to the offer by libelant of telegram or night-letter dated November 9, 1915, addressed to Captain Bagott, master of S. S. "Eureka," at New Orleans, La., signed Chas. Kurz, claimant interposes each and all of its continuing objections.

The night-letter is marked Libelant's Exhibit 77.

Mr. PLATT.—As to the offer by libelant of the letter of December 2, 1915, addressed to L. Rubelli's Sons at Philadelphia, and signed by Phelps Brothers, and attached thereto what purports to be a copy of a letter from the National Carbon Copy, dated December 1, 1915, addressed to Phelps Brothers, New York City, and L. Rubelli's Sons at Philadelphia, claimant makes each and all of the continuing objections heretofore placed in the record, and in addition thereto, objects on the ground that the letters offered are incompetent, irrelevant and immaterial because heretofore, by [189] Libelant's Exhibits 33, 39 and 40, libelant placed in evidence proof that Messrs. Phelps Brothers & Company and Messrs. L. Rubelli's Sons were not general agents for the steamship "Eureka," her owners, past or present, or her charterers, but were only agents for the solicitation and providing of cargo, and furthermore, the witness Charles Kurz has himself testified that at no time were L. Rubelli's Sons or Phelps Brothers & Company and Charles Kurz or any or all of them general agents of the S. S. "Eureka," her owners, past or present, or her charterers or any of them, but were only agents as defined in the said Libelant's Exhibits 33, 39 and 40, and consequently the letters now offered in evidence

(Deposition of Charles Kurz.)

and all other letters of a similar character by which libelant is attempting to charge that L. Rubelli's Sons, Phelps Brothers & Company, and Charles Kurz, or each or any of them, were general agents of the steamship "Eureka," her owners, past or present, or her charterers, or any of them, are each and all of them incompetent irrelevant and immaterial, which objection is hereby made a continuing one as to all of the offers heretofore or which may hereafter be made, or any of them; and claimant further objects to the admission of the letters in evidence [190] as incompetent, irrelevant and immaterial on the ground that it is not a claim within the provisions of Clause 6 of the bill of lading, nor, if it should be a claim, is it presented within the time therein named.

Mr. WELLES.—Libelant submits that this letter is admissible for the reasons already stated, and also submits that libelant is not bound by the statements of the witness and the exhibits referred to in view of this witness' other testimony.

The letters referred to are marked Libelant's Exhibits 78 and 78-A respectively.

Mr. PLATT.—As to the offer now made by Libelant of the letter of December 7th, 1915, addressed to L. Rubelli's Sons, Philadelphia, signed by Phelps Brothers & Company, claimant makes the same objection as to the last preceding offer.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 79.

Mr. PLATT.—As to libelant's offer in evidence of

(Deposition of Charles Kurz.)

a letter dated December 8, 1915, addressed to Mr. A. J. Mitchell, Traffic Manager, National Carbon Company, Cleveland, Ohio, signed L. Rubelli's [191] Sons, claimant makes the same objection as to the last two preceding offers.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 80.

Mr. PLATT.—As to the offer by libelant of letter dated January 13, 1916, addressed to the Oregon-California Shipping Co., Portland, Oregon, signed blank, liquidator claimant makes the same objection as to the last three preceding offers.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 81.

Mr. PLATT.—As to the offer by libelant of letter dated January 13, 1916, addressed to Messrs. Phelps Brothers, New York, and signed in the same manner, by the liquidator, claimant makes the same objection as to the last four preceding offers.

Libelant makes the same statement.

The letter is marked Libelant's Exhibit 82.

Mr. PLATT.—As to libelant's offer in evidence of letter dated January 13 1916, addressed to A. J. Mitchell, Traffic Manager, National Carbon Company, signed liquidator, claimant makes the same objection [192] as to the last five preceding offers.

Mr. WELLES.—Libelant makes the same statement.

The letter is marked Libelant's Exhibit 83.

(Deposition of Charles Kurz.)

Mr. PLATT.—Claimant offers in evidence the following telegrams and letters identified by the witness Kurz:

Day-letter dated Philadelphia, October 11, 1915, addressed to the Oregon-California Shipping Co., and signed by L. Rubelli's Sons;

Letter dated October 11, 1915, addressed to Oregon-California Shipping Co., and signed L. Rubelli's Sons;

Letter dated October 16, 1915, addressed to L. Rubelli's Sons, and signed Oregon-California Shipping Co., Inc.;

Day-letter dated October 18, 1915, addressed to Oregon-California Shipping Co., and signed L. Rubelli's Sons;

Letter dated October 25, 1915, addressed to L. Rubelli's Sons, Philadelphia, and signed National Carbon Company, Anson J. Mitchell, Traffic Manager.

Mr. WELLES.—There is no objection as to proof of the sending and receiving of the day-letters [193] and letters, but libelant reserves all rights to object upon the ground of competency, materiality and relevancy to the issues of this action.

The papers referred to are marked consecutively Claimant's Exhibits "I," "J," "K," "L," and "M."

[194] NATIONAL CARBON COMPANY

v.

S. S. "EUREKA."

64 Wall Street, New York, December 20, 1915,
10.30 A. M.

Met pursuant to adjournment.

Present as before.

Deposition of Anson J. Mitchell, for Libelant.

Direct Examination of ANSON J. MITCHELL
(Continued).

(By Mr. WELLES.)

Q. Mr. Mitchell, did you subsequently send the same number of dry cells to the points of destination of these original shipments in order to replace the original shipments which were not delivered?

Mr. PLATT.—Objected to as incompetent, irrelevant and immaterial, and not a proper element of damage, and on the further ground that the libelant having received and the carrier delivered the subject matter of the shipment of the libelant at the port of New Orleans without objection or qualification, all expenses incurred by the libelant in and about the handling of the shipment after being so delivered and received are incompetent, irrelevant and immaterial; on [195] the further ground that under the terms of the bill of lading, the carrier, under the circumstances which have been heretofore recited and testified to by the witness, was authorized and entitled to deliver the goods which were the subject matter of the libelant's shipment to the libelant at

(Deposition of Anson J. Mitchell.)

New Orleans, whether the libelant accepted the same voluntarily or otherwise, and that any expenses incurred by the libelant in and about the shipment so delivered are not proper elements of damage, and any testimony with relation to the same is incompetent, irrelevant and immaterial, and on the further ground that no claim having been presented within ten days from the date of the said delivery and acceptance, any testimony as to the said claim is incompetent, irrelevant and immaterial. This objection, is made as a continuing objection to all interrogatories calling for testimony of this character, and where the libelant's interrogatories do not disclose the nature of the answer to be expected, is made as a continuing motion to strike out from the record the same on the same grounds and for the same reasons as the objection to the admission of the testimony.

Mr. WELLES.—It is understood that every [196] objection interposed by counsel for claimant is excepted to and is a continuing one, whether so stated or not, to each and all of the objections interposed. A. Yes.

Q. Was it necessary to do this?

Same objection and exception.

A. It was.

Q. Did you send them as soon as they could be gotten out from your Cleveland plant?

Same objection and exception.

A. Yes, sir.

Q. Did you realize as good a price for those cells

(Deposition of Anson J. Mitchell.)

as you would have realized from the original cells?

Mr. PLATT.—Same objection, and the added objection that prospective profits are not a proper element of damage.

Same exception.

A. No, sir, we did not.

Q. What did you realize?

Same objection and exception.

A. Two cents per cell less.

Q. What did this two cents per cell less amount to?

Same objection and exception.

A. There were 45775 cells at two cents per cell, which would be \$915.50.

[197] Q. What was the amount of freight charges that you paid on these replacement cells to California from Cleveland?

Same objection and exception.

A. \$1,312.66.

Q. Was this greater or less than the original freight that you paid the "Eureka"? A. Greater.

Q. How much greater?

Same objection and exception.

A. The "Eureka" price was 50 cents per 100 pounds, while the price we had to pay on replacing was \$1.25 per hundred weight.

Q. What did that amount to on this shipment?

Same objection and exception.

A. The increase on the shipment amounted to \$787.60.

Q. What were the items of expense at New Or-

(Deposition of Anson J. Mitchell.)

leans totaling the \$261.81 to which you have already testified?

Same continuing objection and on the further ground that it is incompetent, irrelevant and immaterial as not being a proper element of damage.

Same exception.

A. Transportation charges of \$88.25.

Q. You mean by that your fare?

A. Fare down and back and sleeper and incidentals.

Q. What other charges?

[198] Same objection and exception.

A. The expenses and incidentals to repacking and recoopering and expenses like that, which had to be done at New Orleans, \$57.86, hotel and meals \$100.05, sundries such as tips and things that are absolutely necessary on trips like that, \$15.65.

Q. Does that total \$261.81? A. It does.

Q. Were these all necessary expenses to your trip down there?

Mr. PLATT.—Continuing objection, and on the same grounds heretofore stated, that it is not a proper element of damage.

A. I might say this, that in checking up this expense account the other day, I found I had charged one day's expenses which really should not have gone in, because it was necessary on coming back for me to stop off at Washington to see a man on another matter, and I included this in my expense account. I did not notice it till I checked it up the other day, because it all goes in to my company as expense

(Deposition of Anson J. Mitchell.)

account at one time, so you might say \$15 in there really should not be included in that, that is included in the whole thing, you might say, so you can deduct \$15 from that and I think it would be a fair expense account.

Q. And the other items aside from that \$15 were all [199] necessary to the trip?

A. All necessary on account of that.

Q. Did you go down to New Orleans for any other business besides this?

Same objection and exception.

A. No, sir.

Q. The sole business, then, transacted on this trip was in connection with the "Eureka" shipment and the side trip to Washington of \$15 that you mentioned?

Same objection and exception.

A. Yes.

Q. If you had not made this trip to New Orleans would you have made the side trip?

Same objection and exception.

A. Not at the time, no, I would have waited until I had other matters to handle at Washington.

Q. What do these items of freight charges and depreciation of market value added to the total of \$4,-037.58 previously testified to amount to?

Mr. PLATT.—Claimant objects to the testimony sought to be elicited on the ground that the same is incompetent, irrelevant and immaterial, in that the bill of lading required the libelant to present a claim in writing to the shipper within 10 days of the date

(Deposition of Anson J. Mitchell.)

of delivery to it, and that if such [200] claim has been presented in writing it is the best evidence, and oral testimony is incompetent to vary the terms thereof, or change the amount or modify the items. I also make the continuing objection.

Mr. WELLES.—Exception, as the bill of lading speaks for itself.

A. \$6,250.74, with a credit of \$531.97 for 15 barrels short shipped which did not go forward on the "Eureka," making a total of \$5,718.77.

The WITNESS.—I wish to refer to page 93 of the record and correct a statement there as to insurance charges, as no insurance charges were paid on the replacement shipment from Cleveland to California.

Q. Mr. Mitchell, I show you this statement consisting of eight pages, totalling \$5,718.77 and ask you if that is a correct statement of the items of damage of the National Carbon Company against the steamship "Eureka"? A. It is.

The statement is offered in evidence. It is marked Libellant's Exhibit 84A to 84H.

(By Mr. PLATT.)

Q. When was this instrument which is now offered in evidence prepared?

A. Pages 2, 3, 4, 5, 6, 7 and 8 were prepared prior to September and rendered on September 6, 1916.

[201] Q. To whom were they sent?

A. They were sent to Harrington, Bigham & Englar, our attorneys.

Q. Was this instrument now offered in evidence

(Deposition of Anson J. Mitchell.)

or any duplicate thereof sent to the Oregon-California Shipping Co., or to anyone other than Harrington, Bigham & Englar by the libelant? A. No.

Q. The remaining sheet of the eight numbered one, is merely a compilation that you have made during this hearing, as I understand it?

A. I did not prepare that at the time, because I had not had a chance to see our attorneys as to whether or not I had a right to do so.

Mr. PLATT.—The instrument offered in evidence is objected to in addition to the continuing objections heretofore interposed on the ground that the same is merely a compilation of the witness' theory of the amount that the libelant is entitled to recover, and is not competent for that purpose? It is not a document which has ever been presented to the carrier or claimant under the bill of lading, the ship or any one at any time connected therewith, and no theory of evidence would be admissible, it is wholly incompetent, irrelevant and immaterial.

Mr. WELLES.—Excepted to as incompetent, irrelevant and immaterial, consisting of conclusions, and upon the additional ground that it has already [202] been shown that written demand for damage has been duly made by the carrier.

Same exception.

(By Mr. WELLES.)

Q. Do all the items on this statement represent loss or expenditures made by the National Carbon Company in connection with these shipments on the S. S. "Eureka," involved in this case?

(Deposition of Anson J. Mitchell.)

Same objection and exception.

A. They do.

Q. Were you authorized by the National Carbon Company to prepare this statement?

Same objection and exception.

A. Yes.

Q. Do you know from your own knowledge that the items therein stated are correct?

Same objection and exception.

A. I do.

Q. Do you recall when you were in New Orleans you delivered to Mr. Williams a certain paper or writing in the presenece of Mr. Kurz, to which Mr. Kurz has referred in his testimony? A. I do.

Q. Have you the original or a copy of that paper?

A. I have not.

Mr. WELLES.—I call for the original of that [203] paper or writing.

Mr. PLATT.—The claimant, in answer to that demand, replies that the alleged document is not within its possession or that of any of its attorneys or agents; that it never heard of the same until the hearing in Philadelphia yesterday, and that it has no means of obtaining the same which is not open to libelant; that there has been no showing of diligence on the part of the libelant to obtain the same, and that the demand comes too late.

Mr. WELLES.—Excepted to among other reasons because it is shown that the writing or paper was delivered to an agent of the steamship "Eureka."

Q. Did you keep any copy of that writing or

(Deposition of Anson J. Mitchell.)

paper? A. I believe I did, yes, I know I did.

Q. Have you tried to find and bring with you that copy?

A. I have searched all through my files and cannot find it.

Q. What was contained in that paper or writing?

Mr. PLATT.—In addition to the continuing objection heretofore interposed, claimant objects on the ground that the testimony of the witness on this subject is incompetent, irrelevant and immaterial, and on the further ground that the oral testimony of the witness on the showing made [204] is incompetent because it would not be the best evidence, and no diligence has been shown on the part of the libelant to obtain the original; and that in the absence of such a showing of diligence and inability, after due diligence, to obtain the same, secondary evidence of the contents of the writing is entirely incompetent.

Same exception.

A. After reaching New Orleans, not being perfectly clear as to my legal rights, I talked the matter over with the attorney for the Southern Pacific Railroad Company, and he advised—

Mr. PLATT.—Objected to on the ground that the answer now sought to be elicited is purely hearsay, not within the scope of the question.

Q. What was contained in that letter?

Same objections.

Same exception.

A. The demand for the goods.

Q. What were the exact words of that letter, as

(Deposition of Anson J. Mitchell.)

well as you can recall them at present?

A. I can tell you the gist, but I cannot tell exactly.

Q. State as closely as you can?

Same objections and exception.

A. I made a demand for the goods.

[205] Q. The letter demanded the goods?

Same objections and exception.

O. The letter contained a demand for the goods and a notice that we would make claim for damage, and the amount of the claim or damage could not be ascertained until after the goods had been returned to the factory for fixing up or reconditioning.

Q. Do you recall the exact wording of the letter or writing?

Same objections and exception. A. I do not.

Q. Who is this Mr. Williams?

A. He was the manager of the Oregon-California Shipping Co.

Q. Where was his office? A. At that time?

Q. Yes.

A. St. Charles Hotel was where his office was at that time, New Orleans, at that time, but I gave him the letter in the office of the Santa Fe Railroad Company which is also in the St. Charles Hotel at New Orleans.

Q. Do you know what Mr. Williams' present address is? A. I do not.

Q. Has he an office in New York?

A. I don't know.

Q. Have you had any information as to where his present office is?

(Deposition of Anson J. Mitchell.)

A. I was advised by Mr. Kurz of the Philadelphia Shipping Company yesterday while in his office that Mr. Williams was at present employed by them in New [206] York City.

Q. When was this letter or writing delivered to Mr. Williams in New Orleans?

A. On November 19th.

Q. 1915? A. 1915.

Mr. WELLES.—You may cross-examine.

Cross-examination by Mr. PLATT.

Q. If you had been interested, Mr. Mitchell, in obtaining Mr. Williams' address in New York, you could have asked the same of Mr. Kurz, could you not, at that time?

A. I thought you knew his address and that we would see him here either this day or the following day.

Q. You don't mean to imply, do you, by your answers to the questions that have been put to you with reference to Mr. Williams' whereabouts in New York that you cannot ascertain it if you desire?

A. No—

Q. When you first negotiated with the Oregon-California Shipping Company to transport dry cells from the ports of New York and Philadelphia to the ports of San Pedro, San Francisco and Portland on the west coast, did you make any investigation as to the character of the construction of the carriers by which those dry cells were to be transported?

A. Yes, I did, I was in New York shortly before.

(Deposition of Anson J. Mitchell.)

I offered these batteries, or got a price from Rubelli's Sons—negotiating with the American-Hawaiian Line and the Luckenbach people, trying to get them to [207] reduce the rate on dry cells from New York to the ports mentioned. I did not induce them, but was told by the railroad people that perhaps I could get a better rate from the Oregon-California Shipping Company and also the Panama Pacific Line. I then got in touch with those people, and they told me about the conditions of the "Eureka" and the "Tampico," also the "Kroonland" and the "Finland," and I think there was one other, the Grace Line, W. R. Grace & Company's Line and other steamers.

Q. How much better rate per 100 pounds could you get on the "Eureka" than your investigation showed you you could have obtained from the other lines mentioned?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial upon the issues in this action, and I move that the question and answer be stricken out, and also all testimony as to negotiations with other carriers.

A. I think it was 30 cents per hundred weight.

Q. The rate you paid on the "Eureka" was 50 cents a hundred weight? A. Yes.

Q. And the best you were able to obtain on other ships was 80 cents? A. At that time.

Q. What investigation, if any, did you make as to the nature of the ships that were operated by the

(Deposition of Anson J. Mitchell.)

Oregon-California Shipping Co.?

[208] Same objection.

A. I asked that question and they told me practically the same as the Emory Steamship Company, with whom we already had made quite a number of shipments.

Q. Did you know that they were lumber carriers, bringing lumber from the west coast to the east coast, and taking back miscellaneous cargo from the east coast to the west coast?

Same objection.

A. I don't believe I did at that time.

Q. Did you make any inquiry as to whether they were steel or wooden ships? A. No.

Same objection.

Q. Did you make any inquiry as to whether or not they were ventilated or unventilated boats?

A. No.

Same objection.

Q. I hand you Libelant's Exhibit 17, being a telegram dated October 25, 1915, addressed by the libelant to the Oregon-California Shipping Co., at Portland, Oregon, and ask you if that is not the first communication of any kind or nature in writing that you made to the Oregon-California Shipping Co. with reference to your shipment on the S. S. "Eureka"?

A. No, I considered L. Rubelli's Sons—

Q. I want a direct answer to this question.

A. No.

Q. Will you point out any communications in writing addressed to the Oregon-California Shipping Co.,

(Deposition of Anson J. Mitchell.)

at Portland, [209] Oregon, that is in evidence in this case, prior in date to Libelant's Exhibit 17, dated October 25, 1915?

Mr. WELLES.—Libelant objects and moves that this question be stricken out on the ground that the record speaks for itself.

A. (After looking through exhibits.) I am afraid I will have to withdraw that statement because that was the first telegram or written notice in writing addressed to the Oregon-California Shipping Company, at Portland, Oregon.

Q. Or addressed to the Oregon-California Shipping Co. at any other place, is it not?

A. I think so.

Q. Now, Mr. Mitchell, commencing with Libelant's Exhibit 17, dated October 25, 1915, addressed by the libelant to the Oregon-California Shipping Co., at Portland, Oregon, there followed, did there not, four communications from the libelant, or from you, as its traffic manager, to the Oregon-California Shipping Co., at Portland, Oregon, being respectively, telegram of October 27, 1915, Libelant's Exhibit 20; telegram of November 3, 1915, Libelant's Exhibit 23; telegram of November 4, 1915, Libelant's Exhibit 25, and telegram of November 5, 1915, Libelant's Exhibit 27? A. Yes.

Q. Is it not a fact that these five communications from the libelant, or you as its traffic manager, to the Oregon-California Shipping Co. comprise all of the written communications [210] from the libelant, or you as its traffic manager, to the Oregon-California

(Deposition of Anson J. Mitchell.)

Shipping Co. prior to the time that the Libelant's shipment on the S. S. "Eureka" was delivered to the libelant at New Orleans in the month of November 1915?

A. If my memory serves me correctly I addressed—I am positive that the communication I gave to Mr. Williams in the Santa Fe office at New Orleans was addressed to H. M. Williams, manager of the Oregon-California Shipping Co., in which I demanded the goods, and advised him regarding the claim.

Q. With that possible exception, these five communications to which you have heretofore referred comprise all of the written communications from the National Carbon Company or you as its traffic manager, to the Oregon-California Shipping Co., at Portland, prior to the delivery of the goods to you at New Orleans?

Mr. WELLES.—You mean direct to the Oregon-California Shipping Co.?

Mr. PLATT.—Direct to the Oregon-California Shipping Co.

A. As addressed to the Oregon-California Shipping Co.

Q. Did the National Carbon Company receive from the Oregon-California Shipping Co., a notification in writing that it had directed the ship to proceed from Colon to New Orleans for transshipment of the cargo, which written [211] communication was dated on or about October 24th, 1915?

A. No, we did not get one.

(Deposition of Anson J. Mitchell.)

Q. You were, however, advised, were you not, by your Pacific Coast agent by wire dated October 25, 1915, Libelant's Exhibit 18, that the libelant, as consignee at Pacific Coast points, had been notified of such contemplated diversion?

A. Yes, also by Rubelli's Sons as agents.

Q. Were you ever at Colon? A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the libelant to handle that portion of the cargo of the S. S. "Eureka" which was shipped by the National Carbon Company, during any time that the steamship "Eureka" was detained at the east side of the Panama Canal?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial upon the issue in this action.

A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, the American-Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.

[212] Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at any time during the time that the "Eureka" was detained at Colon, on the east side of the Panama Canal, for the handling of that

(Deposition of Anson J. Mitchell.)

portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes.

direct communications at any time while the 'Eureka

Q. Did the National Carbon Company address any direct communications at any time while the "Eureka" was detained at Colon, at the eastern entrance to the Panama Canal, to the ship or to the captain of the ship, in charge thereof? A. No.

Q. In the process of sealing dry batteries, that is, the application of the pitch, rosin and other compositions, is that put upon the head of the cell by machinery or by hand?

A. We have two or three different ways, we have a big kettle from which a pipe comes down over a rolling table or cart, you would call it, in which so many of these cells are loaded, and this spigot comes down, and the man operates it or lets it fall so much on each one. Then we have a can, such as a regular sprinkling can, with the sprinkling part, or course, left off, and that is poured on. Then we have also a common ordinary pitcher from which the seal is poured on to the top.

[213] Q. In other words, it is a hand process?

A. It is a hand process.

Q. Is there any reason why the sealing of these cells, being a hand process,—why this could not all have been done, the reconditioning of these cells could not have been done down at New Orleans?

(Deposition of Anson J. Mitchell.)

A. Yes, there is no way, it would cost more to have bought—

Q. That is not an answer to the question; I am asking you is there any reason, it being a hand process, why it could not have been done at New Orleans?

A. Yes, on account of the material not being at New Orleans.

Q. Suppose that you had taken down to New Orleans with you the necessary raw material and a workman, is there any reason why the cells could not all have been reconditioned at New Orleans?

A. At a much greater expense than what it would have been at the plant.

Q. Is there any reason why it could not have been done, any physical reason?

A. Not if we had equipped a plant for it.

Q. What is the cost of a pitcher?

A. I don't know.

Mr. WELLES.—Are you referring only to the re-sealing now, Mr. Platt?

Mr. PLATT.—Yes.

Q. Suppose that this valuable article, the pitcher, had been purchased, and a workman was present, and you [214] had the necessary amount of the wax material, is there any physical reason why these cells could not all have been resealed at New Orleans?

A. We would have to have had a room free from dust and also free from varying temperature, would have had to have a furnace with a graduated—well,

(Deposition of Anson J. Mitchell.)

they don't call it a thermometer, but something like that, which keeps the heat at a certain degree all the time, so as to pour evenly. It would have taken quite a lot of equipment to do that.

Q. Was there any physical reason why it could not have been done?

A. Not if properly equipped.

Q. What equipment would it have taken?

A. You will have to ask a practical man about that. I really don't know.

Q. Is there anything connected with the testing that could not have been done at New Orleans?

A. No, except we would have had to have a regular tester and the regular testing machine.

Q. All the testing you did at New Orleans was an irregular tester?

A. It was not a regular tester, I am not a regular tester.

Q. But you know how to test? A. Yes.

Q. But that is not a branch of your employment?

A. It is not.

[215] Q. In these various shipments to various points by rail or water, does the National Carbon Company insure against depreciation?

Same objection.

A. No, never.

Q. What is the capital stock of the National Carbon Company?

Objected to as incompetent, irrelevant and immaterial.

A. \$17,500,000, if I remember correctly.

(Deposition of Anson J. Mitchell.)

Q. How many plants?

Same objection.

A. Thirteen. We have one at San Francisco, one on Long Island, one at Jersey City, one at Niagara Falls, one at Clarksburg, West Virginia, two at Cleveland, Ohio; one at Fremont, Ohio; One at Fostoria, Ohio; one at Noblesville, Indiana; one at Toronto, Ont., that is practically all that are really under the name of the National Carbon Company, the other two are subsidiary companies.

Q. They are owned by the National Carbon Company?

A. Will not be owned until the first of the year, put it that way.

Q. What proportion of the total output of all dry cells and carbon products are manufactured and sold by the [216] National Carbon Company?

A. Of the electric light carbon products, owing to the war, I presume 90% of those used in the world are now manufactured by the National Carbon Company. Of the electrode proposition we have approximately 40% of the electrodes in the country. Of the carbon brush proposition we have approximately 50%.

Mr. WELLES.—Libelant moves that all questions and answers relating to the size of the plants and the production of the National Carbon Company be stricken out as incompetent, irrelevant and immaterial.

Mr. PLATT.—It is deemed that the claimant has excepted, and the exception is a continuing one, to

(Deposition of Anson J. Mitchell.)

all objections made by the libelant to any interrogatory propounded by the claimant.

Q. And of the dry batteries?

Mr. WELLES.—Same objection and motion. This objection and motion shall be a continuing one.

A. Of the dry battery proposition we have approximately from 50 to 60% of that manufactured in the United States.

Q. Is it not a fact that subsequent to the delivery to the libelant at New Orleans of the shipment of the National Carbon Company on the steamship "Eureka" that the first communication of any kind addressed to the Oregon-California Shipping Co., at Portland, Oregon, or elsewhere, concerning any claim of damage, was Libelant's Exhibit 38, [217] dated January 11, 1915?

A. Yes, sir, that is the only one I can find addressed direct to the Oregon-California Shipping Company.

Q. Prior to the introduction in evidence at this hearing upon this date of Libelant's Exhibit 84, being a certain itemized statement, did the National Carbon Company prepare and present directly to the Oregon-California Shipping Co. any claim of its alleged damages arising out of three shipments covered by Libelant's Exhibits 1, 3 and 5, upon the SS. "Eureka," beyond and in addition to the communication of January 11, 1916, Libelant's Exhibit 38, subsequent to the date of the delivery of the shipment at New Orleans.

A. No. I will qualify that, I received a com-

(Deposition of Anson J. Mitchell.)

munication from our attorneys asking that we prepare and present to them a statement, as a demand had been made on them for a statement, from the "Eureka." This was done, and mailed to our attorneys on September 6, 1916. That statement did not contain freight nor the loss sustained by depreciation in price, owing to the fact that I was not conversant as to whether or not we were justly entitled to the same without taking it up with our attorneys.

Adjourned to 1:30 P. M.

[218] After recess, 1:30 P. M., December 20/15.

Met pursuant to adjournment.

Present as before.

Cross-examination of Mr. MITCHELL (Continued).
(By Mr. PLATT.)

Q. Referring now to Libelant's Exhibit 2, and to page 2 of Libelant's Exhibit 84, I note that in the former the value of the first shipment of dry cells, being the ones shipped from New York via the steamship "Eureka" (Libelant's Exhibit 1, page 1), is given as \$3111.25 plus 10%, whereas in the second page of Libelant's Exhibit 84 it is given as \$3390.69; how does this discrepancy arise?

A. I can explain that this way, that this invoice, Exhibit 2, at first was only to be used as an insurance charge, and was to be what we considered a notice to the steamship company as to the actual value or what we figure cost value.

Q. It is merely, then, a more accurate recapitulation of the original invoice, Libelant's Exhibit 2, of the actual value of the goods as shipped?

(Deposition of Anson J. Mitchell.)

A. Yes, it is practically the real value; page 2 of the last exhibit is the true value.

Q. What is the 10% added to the value of the shipment as otherwise fixed in Libelant's Exhibit 2?

[219] A. It is an arbitrary charge which we usually have applied to cover freight and insurance and cost when figuring covering factory movements.

Q. You have got that same 10% in the value as figured on page 2 of Libelant's Exhibit 84?

A. No, not that 10%.

Q. That is left off?

A. That is left off entirely.

Q. Referring again to page 2 of Libelant's Exhibit 84, the item of cost of August 31, 1915, \$3,390.69, how many dry cells does that represent?

A. A copy of that exhibit is attached to it, which shows the whole thing, shown on page 3.

Q. These prices per cell named on page 3 of Libelant's Exhibit 84, what do they represent, the wholesale or retail price? A. Wholesale price.

Q. The net wholesale price?

A. Net wholesale price.

Q. As in general use in your entire corporate activity? A. Yes, sir.

Q. The same is true as to the items on page 2, covering shipment which left Cleveland on September 4, 1915, being the bill of lading, Libelant's Exhibit 3, and the shipment that left Cleveland September 4, 1915, covered by bill of lading, Libelant's Exhibit 5?

A. Yes, and copies of those invoices, the contents, are attached as sheets 4 and 5.

(Deposition of Anson J. Mitchell.)

Q. I notice in making up your statement, Exhibit 84, that on the first page you have added to the net difference [220] between what you claim was the net wholesale price less certain expenses, an item of 2% depreciation of market, what do you mean by that?

A. Had those cells been delivered at destination, instead of getting a basis of 26 to 27 cents at destination we would have gotten 29 to 30 cents.

Q. You mean that you believe that if your Pacific Coast distributing branches had received these goods at the time that you expected that they would be delivered, in the ordinary course of the voyage of the "Eureka," that they would have been able to sell them in the market at two cents apiece average over what they subsequently got for some others?

A. Yes, I can qualify that this way, had those been delivered in the usual course of 23 or 27 or 28 days they would have reached San Francisco and been sold prior to the time when the price of dry batteries was reduced two cents per cell, which price went into effect all over the United States at the same time.

Q. Who reduced the price? A. We did.

Q. So that the reduction in price of two cents per cell which you are now claiming as damages was a voluntary act on the part of the libellant?

A. Owing to the fact that the price of zinc, manganese ore and coke, the constituent elements of the raw materials of the batteries was reduced, which permitted this reduction.

(Deposition of Anson J. Mitchell.)

Q. And the said reduction was the voluntary act of the [221] National Carbon Company?

A. Yes, following the policy which we always adopt in taking contracts or making sales, we always notify, and it is understood by all jobbers that our price will fluctuate according to the price of raw materials, when the price of raw material is higher we have the privilege of increasing the price of our cells, when the price of raw material is reduced or goes down we have given and do give a reduction in price on our cells.

Q. Now, in the transportation of cells which you claim to have sent to the Pacific Coast to supply your branches there, in the place of those which were turned over to you at New Orleans from the S.S. "Eureka," I note on page 1 of Libelant's Exhibit 84 that you charge for freight at the rate of \$1.25 per hundred weight? A. Yes.

Q. In your oral testimony on that subject you gave the net extra freight as \$787.67, whereas on page 1 of Libelant's Exhibit 84 and nowhere else in the claim is a credit given for the difference which you gave in your oral testimony; how do you account for that?

A. Because I paid over to the "Eureka" people and had no refund, and they had not taken the cargo around,—then to replace that I had to pay another \$1.25 per hundred weight to carry these cells from my factory to their destination.

Q. Have you not figured in your claim that original 50 cents freight?

A. No, I have not included that at all.

(Deposition of Anson J. Mitchell.)

[222] Q. Is not that included in the invoice price of these cells as you have just delineated them?

A. No, it is not.

Q. That \$1.25 per hundred weight which you are now seeking to charge against the ship for the claimed substitution of cells for Pacific Coast consumption was the overland rail rate? A. It was.

Q. When do you claim those substituted cells were shipped to the Pacific Coast?

A. That would be a very hard question to answer, to give you the exact date, because just as soon as we realized that the Canal was closed, and also during the time when the Canal was open, we were shipping batteries all rail.

Q. Did you, as a matter of fact, ship any specific batteries to the number of 45,775 that was included in the "Eureka" shipment, specifically in substitution for that quantity, or are you now simply including in your bill, Libelant's Exhibit 84, an equivalent number at the all-rail rate which you were shipping contemporaneously with the shipments that went by the S.S. "Eureka"?

A. Certain cells in these shipments were special, going to the Navy; certain other cells were special, going to special customers, and it was therefore necessary for us to make up special cells and duplicate orders, and shipments by rail of the cells that were originally on the "Eureka" in order to take their place.

[223] Q. Is it not a fact that on the Cleveland invoice of August 31, 1915, page 3 of Libelant's Ex-

(Deposition of Anson J. Mitchell.)

hibit 84, 10,750 2½ by 6 Columbia Ignitor Cells, Screw Conn, appears; on the Cleveland invoice of September 4, 1915, page 4 of the same exhibit, 13,500 of the same, on the Cleveland invoice of September 4, 1915, page 5 of the same exhibit 10,750 of the same,—those were not specials, were they?

A. No.

Q. That is the standard size?

A. That is the standard size.

Q. So that out of a total of 45,000 the number of specials were decidedly limited in number, as shown by these invoices? A. Yes.

Q. So to go back now to the inquiry, you have in this compilation, exhibit 84, attempted to charge up against the ship the freights, all rail, on an equivalent number of cells of the same character, not specifically shipped in substitution of the shipments delivered and received by you at New Orleans from the "Eureka," but from your general shipments to the Pacific Coast?

Mr. WELLES.—I object to the question on the ground that it is not sufficiently definite to be answered by the witness; not sufficiently clear.

A. I am only charging freight on the cells which were used to replace the cells shipped on the original orders by the SS. "Eureka."

[224] Q. That being true, give us now the dates of those substituted shipments, the car numbers, the quantities, the amount paid out in freight, in order that we may determine when these substitutions took place?

(Deposition of Anson J. Mitchell.)

A. I would have to secure that from the records at Cleveland.

Q. As a matter of fact, Mr. Mitchell, you were shipping by rail as well as by water at these different cut rates that you got from the steamship companies batteries from your various eastern plants, including the one at Cleveland, from which the "Eureka" shipment originated, to the Pacific Coast?

A. Yes.

Q. And as a matter of fact, if you had all your Cleveland records here, you could not pick out, could you, any specific shipment which you would be able to say as an absolute matter of fact was in substitution for the "Eureka" shipment?

A. I believe I can, because whenever an order is destroyed, or whenever an order is cancelled, and afterwards reissued, there is what is called a replacing order. Now, these orders were what we call unfilled, and I have every reason to believe that I can give you specific records of cars covering the identical goods as made up from this cancellation of order.

Q. Assuming, now, that that is true, these goods were all shipped on the "Eureka" by the National Carbon Company to the National Carbon Company on the Pacific Coast? A. Yes.

[225] Q. For resale there by the libellant?

A. Yes.

Q. Was there any time subsequent to the non-delivery or nonreceipt of these goods on the Pacific Coast from the "Eureka" that the National Carbon

(Deposition of Anson J. Mitchell.)

Company was out of carbon dry cells to sell on the Pacific Coast? A. I think so.

Q. That being so, why did you reduce the price per cell two cents, when you were short of goods for that market, and attempt to charge that up to the vessel?

A. Because the San Francisco trade is practically, —well, it is a very small part of our business.

Q. Why didn't you raise the price, if the Pacific Coast market was greater than your supply, and keep down the damages in this case instead of voluntarily marking the price down and then attempting to add the freight on the substituted shipment in addition?

A. Because our competitors on the Pacific Coast had cells and were able to ship them out immediately, and therefore take the trade, which we would naturally have taken care of had we the cells there.

Q. In addition to what you were shipping overland, you were shipping by other steamers than the "Eureka," were you not? A. Yes, sir.

Q. And you were getting rates of carriage all the way from 80 cents a hundred down, were you not?

A. Yes.

Q. You shipped subsequent to the "Eureka" by the Panama [226] Canal, after it was opened, did you not? A. Do you mean lately?

Q. Subsequently to the opening of the Panama Canal, after the slide that detained the "Eureka"?

A. We have not shipped any by water since that time.

(Deposition of Anson J. Mitchell.)

Q. Why?

A. Well, because of the scarcity of boats.

Mr. WELLES.—Libelant objects and moves that the question and answer be stricken out as incompetent, irrelevant and immaterial to the issues of this action.

A. Any other reason?

A. No, I don't know of any other reason except that we have not had a price, there have been no boats offered going around that way. We intend to ship that way, that is, after the war is over, if the freights go down to normal.

Q. Turning now to Libelant's Exhibit 31, how do you account for the fact that this shipment was made in the month of November, and the freight is stamped paid in December, 1915?

A. For this reason, that the freight prepaid mark is put on by one of our time clerks.

Q. So that those three stamps giving the date of the freight prepaid is an office memorandum in the office of the National Carbon Company, and has no relation to the date that the freight was actually paid by you at New Orleans? A. No.

[227] Q. In working out this credit which you have made for the 15 barrels short shipped, as shown on Libelant's Exhibit 84, did you include in that credit merely the Cleveland wholesale price, and did you add thereto the saving of two cents per cell alleged to be due to the depreciation of market, alleged difference in freight to Pacific Coast points which you saved, and the other items which you saved by

(Deposition of Anson J. Mitchell.)

not having them included in the "Eureka" shipment?

A. If you will specify what other items you mean I will be glad to answer that.

Q. Hotel expenses and tips?

A. Yes, sir; I did; I included in the credit of \$531.97 the two cents per cell which amounted to \$36.50, the freight for replacing, \$56.25, and the price of the cells, which would be 1875 cells at the price of .23425 cents, being a total of \$438.22, making a grand total of \$531.97.

Q. I now hand you Libelant's Exhibit 13, which contains the statement "you must understand the National Carbon Company have legally notified us that they have \$50,000 worth of goods on board," that is a mistake in amount, is it not?

A. Should have been \$15,000.

Q. Approximately?

A. Approximately, yes. An error of the stenographer.

Redirect Examination by Mr. WELLES.

Q. Why were these shipments that were not delivered by [228] the "Eureka" replaced in California from your Cleveland plant?

A. Because some of them were special and also we had to keep a supply of goods in California so as to meet the orders, or to fill the orders from our customers, so that it was absolutely necessary that we supply a replacing order.

Q. Could the California orders be supplied from any of your other plants at that time?

(Deposition of Anson J. Mitchell.)

A. Well, we might have shipped them from Fremont, which is adjoining to Cleveland.

Q. Would there be any difference in the freight or other charges which you have testified to if they had been shipped from the Fremont Plant?

A. No, this freight rate of \$1.25 is what is called the postal rate, and applies from all points of the United States east of the Missouri River.

Q. Was the rate the same from New Orleans?

A. It was.

Q. And the same from Jersey City? A. It was.

Q. Referring to the reduction of two cents in the price of these batteries when sold, were they sold at the market price in San Francisco and other California points at that time? A. Yes.

Q. Could you have gotten more for them at that time than the price at which you sold them?

A. Had these goods been delivered in the usual length of time which [229] we expected they would have been when shipped, we would have gotten two cents per cell more.

Q. I refer to the goods that you actually did sell, that were necessary to replace the cells that were not delivered to you, did you get for those the full market price at the places where they were sold?

A. Yes, sir, we did.

Q. And have you based your amount of damages upon such full market price? A. Yes.

Q. Then that reduction was not a voluntary reduction on the part of the National Carbon Company, was it?

(Deposition of Anson J. Mitchell.)

A. Not as far as these particular cells were concerned, no.

Q. It was due entirely to market conditions, was it? A. Entirely.

Q. What proportion of this shipment consisted of special cells,—I refer to the shipment which was on the “Eureka”?

A. Approximately 4 to 5 per cent.

Q. When the “Eureka” shipments were sent back from New Orleans on the railroad, was the freight prepaid on those shipments? A. It was.

Q. Do you recall when it was prepaid?

A. I think it was prepaid either the day before or the day after Thanksgiving, and that was November 25th, either the 24th or the 26th, of November.

Q. Had the bills of lading been delivered to you before [230] it was prepaid?

A. I think the bills of lading were submitted to me on the afternoon of the 23d or the morning of the 24th. At that time they didn't have the expense bill ready covering the prepaid charges. Mr. Tate, who delivered the bills of lading, stated that he would have that expense bill in the afternoon or the day after Thanksgiving, and I am now more than ever convinced that the freight was prepaid the day after Thanksgiving instead of the day before, which would be the 26th.

Q. Did he give any reason for his delay in not having the expense bill ready?

A. Yes, the goods were not released by the railroad company until the afternoon of the 23d.

(Deposition of Anson J. Mitchell.)

Q. Why were they not released?

A. On account of financial matters between the steamship company's attorney and the railroads who had figured on hauling the cargo away from New Orleans.

Q. Did they refuse to deliver you those goods until those financial matters were adjusted?

A. They did.

(By Mr. PLATT.)

Q. Who did? A. The railroads.

Q. Did the railroads have your stuff?

A. Yes, it was all loaded on the cars, they held it in trust for the steamship company until—well, I won't say that, there was no arrangement to take care of this, the total charges [231] and other charges, and also they had to get permission from their consignee or consignor as to whether or not they would accept the freight at the other end with the advanced charges from New Orleans to New York, there was quite a controversy, and I think Mr. Williams could straighten it out.

Q. In other words, the ship would not let go of the goods until the carrier, the company, engaged in the carriage, had satisfied its maritime lien on the goods for its transportation charges of the vessel from the point of origin to New Orleans?

A. Of course I don't know just exactly the legal reason why, but that is the impression I was getting.
(By Mr. WELLES.)

Q. Had you offered to prepay your freight on these goods before this time? A. Yes.

(Deposition of Anson J. Mitchell.)

Q. Did you prepay that freight and all charges to the agents of the railroad company who were there at that time? A. Yes.

Q. I show you a letter Mr. Mitchell, headed Oregon-California Shipping Co., Inc., dated at Philadelphia, September 4, 1915, and ask you if that is the original letter received by you from the Oregon-California Shipping Co., Inc., in this action, under that date? A. It is.

Mr. WELLES.—I offer the letter in evidence.

[232] Mr. PLATT.—Objected to on the ground that it is not a letter of the Oregon-California Shipping Co., Inc., and does not purport to be. It is a letter purporting to be signed by R. B. Bates, assistant traffic manager of L. Rubelli's Sons, and in accordance with Libelant's Exhibits 33, 37, 39 and 40, heretofore introduced in evidence, by offering which the libelant is bound, it is specifically stated that the party signatory to the letter now offered in evidence and the firm with which he was connected were not the general agents of the Oregon-California Shipping Company, never had been, and were merely the agents for the solicitation of freight, and for each and all of these reasons as well as the continuing objections heretofore briefly noted, the instrument is incompetent, irrelevant and immaterial.

Same exception.

The letter is marked Libelant's Exhibit 85.

Q. Does this letter relate to part of the shipment involved in this action? A. It does.

Q. Were these shipments made in pursuance of

(Deposition of Anson J. Mitchell.)

this letter? A. They were.

(By Mr. PLATT.)

Q. Could you have sold these cells which you claim to [233] have shipped to the Pacific Coast in substitution of the cargo of the steamship "Eureka" if you had not voluntarily reduced the price two cents per cell? A. At that time, you mean?

Q. At the time that you shipped them, at the time they reached San Francisco, or within a reasonable commercial time thereafter during the life of the cells? A. No, not at that price.

(By Mr. WELLES.)

Q. You mean at the two cents additional?

A. Yes.

(By Mr. PLATT.)

Q. Could not have sold them at all? A. No.

Q. You are positive of that? A. Yes.

Q. Your company controlling 60% of the output of dry cells in the United States? A. No.

Q. Could not have sold them on the Pacific Coast unless you had voluntarily reduced the price two cents? A. Not this lot, no.

Q. Could you have sold them during their commercial life? A. No.

Q. Within eight months after their manufacture?

A. Well, now, I could not say that because I don't know when the price was advanced, probably four or five months afterward, when I don't know.

Q. So you could have sold them within four or five [234] months at the "Eureka" price?

(Deposition of Anson J. Mitchell.)

A. If the price was advanced then, yes, but I don't know.

Q. To the best of your recollection, it was advanced?

A. I think four or five months afterward.

(By Mr. WELLES.)

Q. You could not have sold them as first-class cells? A. No.

(By Mr. PLATT.)

Q. Why could you not have sold them within that time as first-class cells?

A. Because we always make it a rule and also it is understood by all of our jobbers and customers that after 90 days a battery is liable to deteriorate, and is hence not what is called an A1 cell, that is practically a trade condition.

(By Mr. WELLES.)

Q. How much difference in price does that make between first and second class cells?

A. It depends entirely on whether we can use them.

Q. At this time?

A. I could not tell, we would have to be governed at that time as to where we could have shipped those.

Q. You could not have sold those in the market at that time? A. No, sir.

Q. It would have been necessary to reship them and sell them somewhere else?

A. Well, I would not say that, because part of them could have gone out to our people who [235] only use a dry battery intermittently, in other words,

(Deposition of Anson J. Mitchell.)

as button work and telephone work and things like that.

Q. So that when the price went up again these cells would not have been available as first-class cells.

A. Not to the trade indiscriminately.

Q. And it would have involved extra expense in order to have marketed them? A. Yes, sir.

(By Mr. PLATT.)

Q. What do you mean by extra expense?

A. We have got to arrange everything, and also got to test them, which means the running of what we call a test.

(By Mr. WELLES.)

Q. And you would have to ship them to other points?

A. Have to ship them in small lots like we did these lots here.

Deposition of Edwin J. Wilson, for Libellant.

[236] EDWIN J. WILSON, recalled.

Redirect Examination by Mr. WELLES.

Q. Are all these batteries which you have mentioned in detail all of the batteries that arrived at your plant from New Orleans ex S. S. "Eureka"?

A. No, that is not all.

Q. What other ones were there?

A. There was a certain percentage of scrap batteries that were not good enough to recondition.

Q. When did these batteries arrive at your Jersey City plant from the "Eureka"?

A. December 6, 1915.

(Deposition of Edwin J. Wilson.)

Mr. PLATT.—Cross-examination closed.

It is hereby stipulated between the parties that the Alaska Steamship Company, claimant, is a corporation under the laws of the State of Nevada, with its principal office and place of business in the city of Seattle, State of Washington; that it is the owner of the steamship "Eureka," and was at the date of the filing of the libel in this case; that on the 8th of September, 1915, the steamship "Eureka" was owned by the Pacific Coast Steamship Company, a corporation, which had chartered said steamship to the Crossett [237] Western Lumber Company, a corporation, and that said Crossett Western Lumber Company had chartered the said steamship to H. M. Williams, Inc., a corporation, which in turn had chartered said steamship to the Oregon-California Shipping Co., Inc., a corporation, and that prior to the filing of the libel in this action said Alaska Steamship Company purchased the entire ownership of the said steamship "Eureka" from the said Pacific Coast Steamship Company, and the said Alaska Steamship Company is now the sole owner thereof.

**Deposition of William A. Richey, for Libelant
(Recalled).**

[238] WILLIAM A. RICHEY, recalled for further cross-examination.

(By Mr. PLATT.)

Q. Mr. Richey, will you state at this time the ingredients, giving the name of each, both the chemical name and the name in common usage, if different

(Deposition of William A. Richey.)

from the chemical name, of each and every ingredient, together with the quantity thereof, that entered into the manufacture of the seals used on the dry cells which were the subject matter of this shipment which you examined, as heretofore stated?

A. The seals for these batteries were made at the Cleveland plant, and of course, as to just the exact amount put into them I could not answer.

Q. You have heretofore testified from within your knowledge as one of the chemists of the National Carbon Company that the system of manufacture and the ingredients used in the manufacture of seals for dry cells are uniform?

A. I can give, as we use at our plant, and as I understand are used at the other plants, the ingredients.

Q. All right, go ahead.

A. The seals for these batteries were of red seal and black seal. The black seal is made from hard pitch, that is, as we make it, there may be some changes,—hard pitch 60% or thereabouts, and soft pitch approximately 25%; talc, which is a silicate of magnesium, approximately 15%. The red seal, which [239] is used for a finishing seal on one grade of batteries, consists of rosin, 50%; venetian red, which is an oxide of iron,— $\text{Fe}_2 \text{O}_3$ —chemically, that is two parts of iron and three of oxygen, 7% of venetian red; silica sand, which is ordinary silicate, 32%; talc, which is magnesium silicate, largely, 10%. In some of the seals, a small percentage, say perhaps one, of hydrated lime is added for its effect upon the

(Deposition of William A. Richey.)

melting point of the seal. That constitutes the ingredients.

Q. As I understand you in these three shipments covered by Libelant's Exhibits 1, 3 and 5, all of the seals, to the best of your chemical knowledge and belief, were manufactured from either one or the other of the two formulae which you have just mentioned?

A. Yes.

Q. Did these seals differ in manufacture, as to ingredients and method of manufacture, from the method of manufacture and ingredients used in the seals shipped out for your regular trade, other than that you have added or there has been added or was added this hydrated lime for the purpose of retarding the melting point of those particular seals, due to their tropical carriage?

A. The various factories determine the slight changes in proportion that they use in these materials; that depends upon the quality of the various raw materials that go into it, differ very slightly from time to time.

[240] Q. You mean by raw material the other ingredients that are going into the seal?

A. Yes, the raw materials, of course, are those ingredients from which the finished material is made.

Q. I don't recall whether I got an answer to the inquiry whether the National Carbon Company in manufacturing the seals to be put upon their dry batteries for transportation to the tropics, used the same formulae that they would for transportation in temperate climates, except that there is added the

(Deposition of William A. Richey.)

additional element of hydrated lime for the purpose of retarding the melting point?

A. In some cases the percentage of hard pitch is increased so as to maintain a melting point sufficiently high to meet these conditions.

Q. Increased beyond the percentage which you have given in the formula? A. It is; yes.

Q. What would it be as to the seals in question?

A. I would give what is as I understand sometimes used as a percentage, the percentages of these are changed slightly as to the increase of the melting point, so that the percentage of hard pitch might be increased to 75; the soft pitch would be 10% and the talc would be 15%.

Q. Without any hydrated lime?

A. That is just the black seal, the hydrated lime, you understand, went into the red seal only.

[241] Q. For tropical carriage would you alter the proportions of the ingredients in the red seal?

A. The melting point, if not sufficiently high, might be increased by slightly increasing the percentage of hydrated lime, which is sometimes done.

Q. And if the formula was so recast, how would it then read?

A. Under those conditions the rosin would approximate 50%, the venetian red 7%, silica sand 31%, talc 10% and hydrated lime might be increased as much as 2%,—might be made as much as 2%, not increased.

Q. From your examination of the seals on the shipment that came back to the Jersey City plant

(Deposition of William A. Richey.)

from New Orleans from the S. S. "Eureka," were the cells made according to the revised formulae which you have given for black and red seals, increasing the quantity of hard pitch in the former and of hydrated lime in the latter, to advance the melting point, or were they manufactured according to the first named two formulae?

A. I made no detailed quantitative examination of these, and I could not say as to which formula it came under.

Q. You don't know, then, as a matter of fact, whether these seals were made according to the accepted formulae for tropical carriage or not?

A. I cannot answer that.

Q. The first named formulae that you gave was the standard temperate zone formulae and the second two might be called the standard tropical formulae?

A. Yes.

[242] Q. Can you tell what proportion of the shipment, in a general way, not attempting to make it absolute, was black and what proportion of it red seal batteries?

A. I should say 75% were finished with the red seal.

Q. Provided the seal remains intact, being properly constructed, so as to keep out air or moisture, is there any chemical action going on inside of the battery which is affected by either heat or cold, as such?

A. There is.

Q. To what extent is the diminishing life of a battery accelerated by external heat, not sufficient to

(Deposition of William A. Richey.)

produce such a melting of the seal as to permit the entrance of external air or heat?

A. The action of a cell under the influence of heat, even though the seal remains intact, goes on rapidly under the influence of external heat,—goes on more rapidly under the influence of external heat than it does where the temperature is moderate or lower.

Q. That being so, it necessarily follows, does it not, that in the summers of a temperate climate the deterioration in the cell goes on more rapidly where the temperature is not sufficiently warm to affect the seal, than it would in the fall or spring or winter of that same temperate climate?

A. The chemical action in a cell is increased by the effect of heat, always.

Q. So that in shipping dry cells from the Atlantic Coast to the Pacific Coast through the tropics, you know [243] in advance that the deterioration or shortening of the life of the cell would go on more rapidly than it would if you shipped those same dry cells overland through the temperate zone by rail, isn't that a fact?

A. We expect the action to be increased as the heat increases, more or less.

Q. How do you retorch the seals, explain the process?

A. The retorching is done by a blast lamp; a blast lamp is the apparatus used.

Q. Such as a plumber uses?

A. It is a torch that is constructed so that it is fed both by gas and by air.

(Deposition of William A. Richey.)

Q. Similar to that used by plumbers and steam fitters? A. No, not as I understand it.

Q. Explain the difference, if you can, in the one that you did use?

A. The torch that is used is fitted so that it has an air inlet and a gas inlet, the gas and air are admitted at the rear end of the tube or torch, they are mixed at the end where the gas is ignited. Of course the mixing of the gas and the air makes the combustion of the gas more complete.

Q. This torch, so constructed, is applied in what way to retorch dry cells?

A. The flame is simply played over the top of the seal so as to soften the surface of the seal and cause it to flow together, making a smooth finish.

[244] Q. Are these torches movable?

A. They are.

Q. And operated by hand? A. They are.

Q. How do you re-jacket damaged dry cells?

A. The process of jacketing consists of putting the cell into a round cardboard jacket, made so as to fit the can very snugly.

Q. It has printed matter on the outside of it?

A. Yes.

Q. Fastened on with what, is it all prepared so that it does not have to have any glue or other substance after it is placed outside of the can?

A. There is no cementing fluid or anything of that kind that fastens the jacket to the can.

Q. It fits tight, in other words?

A. It fits sufficiently tight.

(Deposition of William A. Richey.)

Q. Explain the process of reconditioning a damaged dry cell?

A. By reconditioning we simply mean putting the cell in a proper condition, what we consider a finished condition, rather, so that it presents the appearance of an original cell.

Q. Not only the appearance, but also the electrical power of either the original cell or one which is commercially salable?

A. In reconditioning the electric power of course is not changed.

Q. Well, supposing that in testing, it would not test up to your minimum, you recondition it so as to put it above the minimum, do you not?

A. The reconditioning generally does not consist in increasing the electrical [245] energy.

Q. What do you call that process?

A. We do not understand that the electrical energy on reconditioning can be increased.

Q. In other words, the 50% of the "Eureka" shipment which you have heretofore testified that you reconditioned in order to bring them up to the commercial standard, did not require any addition to its electrical constituents?

A. We made no addition, no change in the electrical—that is, in the special constituents of the dry battery.

Q. Did you do anything, as a matter of fact, except to retorch the seals which showed melting, re-jacket the jackets that had been scuffed, and repack them?

(Deposition of William A. Richey.)

A. To my knowledge that constitutes the reconditioning that was done.

(By Mr. WELLES.)

Q. Is it not a fact that some of the cells in this lot were so far gone that they could not be reconditioned? A. It is.

Q. And were thrown into scrap?

A. Thrown into scrap.

(By Mr. PLATT.)

Q. Do you know what percentage?

A. No, I cannot give the percentage on that.

Q. It was very small, was it not?

A. Well, I would not say as to that, I did not do the final sorting of them.

[246] Redirect Examination by Mr. WELLES.

Q. As I understand, your practice is that if a cell is not in sufficiently good condition so that it can be fixed up or reconditioned and shipped again as a first-class cell or cell of a lower grade, you simply discard it and replace it with another one from the factory, is that right? A. That is true.

Q. You don't try to refill the cans?

A. We make no attempt to replace the essential constituents of a dry cell.

Q. What is the significance of red seals and black seals, is it anything more than a mere coloring for trade purposes?

A. The red seal finish is required by certain customers, I should say, or rather we make a distinctive brand with the red seal finish; of course it characterizes that particular brand.

(Deposition of William A. Richey.)

Q. Don't you know the reason for using red and black seals?

A. The reason for using the red seal is that it characterizes the particular grade of cell.

Q. Is the black seal just as good a cell in general as the red seal?

A. A black seal, as far as the electrical service is concerned, is as good as the red.

Q. Both the black seal and the red seal battery are practically the same, so far as electrical efficiency is concerned? A. Yes.

Q. And both sell as first-class batteries?

A. Both [247] sell as first-class batteries.

Q. It is merely a difference of brand, is that it?

A. It is.

Q. The system in your plant, I believe you have stated, is the same as in all other plants of the National Carbon Company?

A. As far as I know the same system is carried out throughout all the factories.

Q. It is certainly the same as the Cleveland plant, from your own observation? A. Yes.

Q. When you are shipping dry batteries for use in the tropics, or for passing through the tropics, you always use what is known as the tropic class of cell, with extra high melting point?

A. We make a special seal for the tropical shipments.

Q. That is, a seal with a high melting point?

A. It is.

Q. With these tropical cells, is there very much

(Deposition of William A. Richey.)

difference in the time they last in summer weather as compared with winter weather?

A. We understand no distinction between the life of the cells during the summer or winter months.

Q. There is an increase of depreciation in warm weather, you testified?

A. Yes, there is more action.

Q. That is, they are more active chemically?

A. Yes.

Q. Your object in putting out a cell is to try and get rid of all possible chemical action?

[248] A. The object is to make a cell in which the chemical action will be reduced to the minimum.

Q. While the cell is dormant?

A. While the cell is dormant.

Q. When you speak of increased chemical activity you mean as shown by a pretty delicate test, the difference between the warm weather and the cold?

A. That is determined by what we call corrosion, where we measure the loss, take the loss of the zinc element over a certain definite length of time.

Q. You provide for any deterioration caused by such an increase, don't you?

A. We always consider that point in so far as we are able, we make preparations to meet the conditions to which we think the cell is to be exposed.

Q. And so design it that it will be good for use for about six months?

A. As far as we are able to say?

Q. And salable for that time?

A. They should be salable for six months.

(Deposition of William A. Richey.)

Q. Does the difference between this summer heat and the cool weather, in increasing the activity of the cell, make any real commercial difference to it?

A. We do not recognize any distinction between those conditions, that is, as far as the commercial value of the cell is concerned.

Q. Then you disregard, as I understand it, any difference commercially as to changes of temperature throughout [249] the year, in relation to its effect on the increased activity of the cell; in other words, it makes no difference as far as the cell and the ordinary life of a cell is concerned, whether it is exposed to ordinary summer weather or whether it is exposed to fall or winter weather, does it?

A. As I understand, you refer to a certain range of temperature.

Q. You testified that in ordinary summer weather there would be an increased activity in the cell; do you recall that? A. Yes, that is true.

Q. I am asking you whether that increased activity, due to that difference in temperature, summer weather over cool weather, is sufficient to have any commercial effect or practical effect on the sale of those cells or is it merely a trifling difference?

A. As far as I know it is not taken into consideration in the making of the cells.

Q. I mean does it affect the cell or the class at all, does it make any change?

A. No, it does not affect the sale of them.

It is hereby stipulated, consented and agreed that S. Isabel Classon, notary public, was and hereby is

(Deposition of William A. Richey.)

substituted as notary public and stenographer in the place and stead of C. May Hudson, [250] the person designated in the notice of taking the depositions, and that all of the said witnesses were duly sworn by the said S. Isabel Classon, before taking their said testimony, both in New York and Pennsylvania, with waiver as to time and place, and that said S. Isabel Classon had full authority to take such oaths, and that the claimant has not called the witnesses H. M. Williams and R. H. Baggott.

It is stipulated between counsel for both parties that the taxable costs of the stenographer and notary for taking these depositions is \$248.45.

[251] *United States District Court, Western District of Washington.*

NATIONAL CARBON COMPANY,

Libelant,

against

Steamship "EUREKA," Her Engines, etc.

State of New York,

County of New York,

Southern District of New York,—ss.

I, S. Isabel Classon, a notary public in and for the county of New York, State of New York, duly appointed and empowered to act in and for the County of New York, State of New York, Southern District of New York, and duly authorized under and by virtue of the Acts of Congress and of the United States and of the Revised Statutes to take deposi-

tions *de bene esse* in civil cases depending in the courts of the United States, do hereby certify;

That the foregoing depositions of Anson J. Mitchell, Francis G. Coxon, Edwin J. Wilson, William A. Richey and Charles Kurz, were taken on behalf of the libelant before me, the depositions of the said Anson J. [252] Mitchell, Francis G. Coxon, Edwin J. Wilson, and William A. Richey being taken at the offices of Messrs. Harrington, Bigham & Englar, 64 Wall Street, New York City, N. Y., and the deposition of the said Charles Kurz being taken at the office of the Philadelphia Shipping Co., Room 551, Bullitt Building, 135 South 4th Street, Philadelphia, Pa., pursuant to agreement of counsel; that I was attended upon the taking of said depositions by Frank C. Welles, Esq., of the firm of Harrington, Bigham & Englar, proctors for the libelant, and by Robert Treat Platt, Esq., of the firm of Messrs. Platt & Platt, Portland, Oregon, proctors for claimant and the S. S. "Eureka"; that said witnesses were by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and that they were thereupon examined by counsel present; that I took down their testimony in shorthand, and caused the same to be transcribed in writing by a person under my personal supervision and who is not interested in this cause; that no other persons were present than those above named, and that hereto annexed are Libelant's Exhibits 1 to 85 inclusive, and Claimant's Exhibits "A" to "M," inclusive, referred to in said depositions.

I have retained the said depositions in my posses-

sion for the purpose of delivering the same with my own hand into the United States Postoffice in the city of New York in an enclosed post-paid wrapper addressed to the clerk [253] of the United States District Court, Western District of Washington, Southern Division, Tacoma, Washington.

I further certify that I am not of counsel or attorney for any of the parties in said depositions or in said caption named, nor in any way interested in the event of the above suit.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal this 23d day of December, 1916.

My commission expires March 30, 1917.

[Seal]

S. ISABEL CLASSON,
Notary Public, Kings Co.

Certif. filed in N. Y. Co. #213. Reg. Off. #7189.

**Certificate of Clerk of United States District Court
to Original Depositions and Exhibits.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached depositions with exhibits attached thereto constitute all of the original depositions with all of the original exhibits thereto attached, which were filed and introduced in evidence in the case of National Carbon Company, a Corporation, Libellant,

vs. Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Respondent, and Alaska Steamship Company, a Corporation, Claimant, No. 2049 in said District Court at Tacoma, and required by stipulation of proctors and order of Court to be sent up to the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of said District Court as a part of the Apostles on Appeal in said cause.

ATTEST my hand and the seal of said District Court at Tacoma this 22d day of December, A. D. 1917.

[Seal]

FRANK L. CROSBY,

Clerk.

By F. M. Harshberger,

Deputy Clerk.

[Endorsed]: No. 3102. United States Circuit Court of Appeals for the Ninth Circuit. National Carbon Company, a Corporation, Appellant, vs. Alaska Steamship Company, a Corporation, Claimant of the Steamship "Eureka," Her Engines, Boilers, Tackle, Apparel, Furniture, etc., Appellee. Libellant's Exhibit No. 1—Depositions on Behalf of Libellant, etc. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed December 26, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

